117-346

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 168.

ELIJAH M. DUNPHY, PLAINTIFF IN ERROR,

vs.

ELLEN SULLIVAN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED NOVEMBER 10, 1882.

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1 In the District Court, 3d Judicial District, Lewis & Clarke County, Montana Territory.

ELLEN SULLIVAN, Plaintiff,
vs.
ELIJAH M. DUNPHY and THOMAS H. WHITE, Defendants.

Be it remembered that among the proceedings had and done in said district court in the above-entitled action are the following, viz:

On the 3rd day of June, A. D. 1879, the plaintiff filed herein her complaint against the said defendants in the words and figures following:

In the Third Judicial District Court, Lewis & Clarke County, Montana Territory.

ELLEN SULLIVAN, Plaintiff,
vs.
ELIJAH M. DUNPHY and THOMAS WHITE, Defendants.

2 The plaintiff, for complaint herein against the above-named defendants, states:

1. That this plaintiff is now, and ever since the second day of August, A. D. 1870, has been, the owner and entitled to the possession of the following-described property and premises, to wit, lot number eight, in block number thirty, in the town of Helena, Lewis and Clarke county, Montana Territory, and being twenty-five feet front on Main street and one hundred and ten feet deep, and bounded partially on the south by the Masonic Temple. That while the plaintiff was such owner and possessed and entitled to the possession of said lot and premises the said defendant, Elijah M. Dunphy, did, on the 4th day of October, A. D. 1879, without right or title, enter into and upon the same and oust and eject the plaintiff therefrom,
and ever since that day has withheld possession of said prem-
3 ises from this plaintiff, and the said Elijah M. Dunphy and
Thomas White, defendants, do now wrongfully withhold the possession of said premises from this plaintiff, to the plaintiff's damage in the sum of fifty dollars.

3. That this plaintiff and her grantors and predecessors in interest have been in the quiet, lawful, and exclusive possession of said premises since August, 1866, continuously up to and until the 4th day of October, A. D. 1877, and that this plaintiff was in the lawful, continuous, and exclusive possession of said premises from the second day of August, A. D. 1870, up to and until the 4th day of October, A. D. 1877.

4. That the value of the rents and profits of the said lot and premises from the said 4th day of October, A. D. 1877, and while the plaintiff has been excluded therefrom is five hundred dollars.

Wherefore plaintiff demands judgment against said defendants—

1. For the restitution of said lot and premises.
4 2. For the sum of fifty dollars damages for the withholding thereof.

3. Against Elijah M. Dunphy for the sum of five hundred dollars, the value of the rents and profits thereof, together with costs.

SHOBER & LOWRY,
Plaintiff's Att'ys.

MONTANA TERRITORY, *Lewis & Clarke County:*

Patrick McCann, being duly sworn, says: He is the agent for the plaintiff in the above-entitled cause, and that he has heard the foregoing complaint read and knows the contents thereof, and that the facts stated in said complaint are true, to the best knowledge, information, and belief of this affiant; that the reason why this verification is made by this affiant is that said plaintiff is absent from the county where her attorneys reside and is unable to verify the same.

PATRICK McCANN.

5 Subscribed and sworn to before me this 3d day of June,
A. D. 1879.

J. H. SHOBER,
Notary Public, M. T.

And on the 21st day of November, 1879, the defendant, Elijah M. Dunphy, by his attorneys, Chumasero & Chadwick, appeared in said action and filed in the clerk's office of said court his answer to said plaintiff's complaint, which is in the words and figures following, to wit:

Answer of Deft. Dunphy.

In Dist. Court, Third Judicial District, Lewis & Clarke Co., M. T.

ELLEN SULLIVAN *vs.* E. M. DUNPHY *et al.*

And now comes the above-named defendant, Elijah M. Dunphy, & for answer to the complaint herein denies that the said plaintiff is now, or that she ever at any time was, the owner of or entitled to
the possession of the town lot situate in Helena, Montana,
6 and described in the complaint of the said plaintiff.
The said defendant denies that he at any time entered into the possession of the said lot while the said plaintiff was possessed of the said lot or while she was entitled to the possession thereof, or without title or right to enter upon the same or in any manner save as hereinafter affirmatively stated. The said defendant denies that he wrongfully withholds the possession of the said lot from the said plaintiff or in any manner save as hereinafter stated. He denies that he has damaged the said plaintiff in any manner, or in any sum of money whatever.

And said defendant, further answering, denies that the plaintiff or her grantors or predecessors in interest were in the lawful or exclusive possession of the said town lot or any part of the same at any time whatever. And said defendant further denies that the
rents or profits of the said lot were of the value of five
7 hundred dollars for the time stated in the complaint, or that

the value of the use and occupation thereof was more than fifty dollars per annum.

And the said defendant avers that neither said plaintiff or her grantors or predecessors in interest ever at any time had any right or title to the said town lot described in the said complaint; that the same was a vacant, unoccupied lot, situate within the Helena town site, and that the grantor and predecessor in interest of this defendant, to wit, Henry L. Tanner, made an application to the probate judge of the county of Lewis and Clarke, Territory of Montana, on or about the — day of February, in the year A. D. 1873, under the laws of the United States and of the Legislative Assembly of the Territory of Montana, for the deed to the said premises, he then being the owner thereof and entitled to the possession thereof, and under and by virtue of such application received a deed from
the said probate judge for the said town lot described in the
8 said complaint, and that since the date of said deed, to wit,
the 22d day of February, in the year A. D. 1873, this defendant and his predecessors in interest have been in the sole, exclusive, and peaceable possession thereof, and that this defendant has erected and placed thereupon valuable permanent improvements to the amount of five thousand dollars, and that this defendant and his predecessors in interest entered into the possession of the said premises under claim of title thereto, to wit, under the deed of the probate judge of the county aforesaid, the same being exclusive of any other right, and that he and his predecessors in interest have been in the continuous and uninterrupted occupation and enjoyment of the said premises from the date last aforesaid until the present time, and that from said date the same has been held adversely to the said plaintiff and all persons whomsoever for a period of more than five years.

9 Wherefore the said defendant avers that the said plaintiff is barred from maintaining an action for the recovery of the said premises under the provisions of chapter II of title III of the Code of Civil Procedure, approved February 16, A. D. 1877, and also by the provisions of chapter 41 of the laws of Montana, approved January 12, A. D. 1879.

Wherefore the defendant prays judgment against the said plaintiff.

CHUMASERO & CHADWICK,
Att'ys for Def't, E. M. Dunphy.

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

Elijah M. Danphy, being first duly sworn, deposes & says: That he is the defendant named in the foregoing answer; that he has heard read said answer, & the same is true of his own knowledge, except as to those matters therein stated to be alleged upon information & belief, & as to those he believes it to be true.

E. M. DUNPHY.

Subscribed & sworn to before me, this 20th day of Nov., 1879.

WM. H. DEWITT,
Notary Public, M. T.

10 And on the 24th day of November, 1879, the plaintiff, Ellen Sullivan, filed her replication to defendant's answer in said clerk's office, which said replication is in the words and figures following, to wit:

Replication.

ELLEN SULLIVAN *vs.* ELIJAH M. DUNPHY *et al.*

Now comes the plaintiff, by her attorneys, Shober and Lowry, and for replication to the answer of defendant, Elijah M. Dunphy, herein, 1st, denies that the premises described in plaintiff's complaint were at any time during the year A. D. 1873 a vacant or unoccupied lot in the town of Helena, Lewis and Clarke county, Montana Territory, but avers the fact to be that said lot was duly deeded to the grantors and predecessors in interest of this plaintiff by the probate judge of Lewis and Clarke county, Montana Territory, under the laws of the United States & the Territory of Montana, on the 18th day of
11 September, A. D. 1869, and that no person (save & except this
plaintiff, her grantors & predecessors in interest) has had any title to said premises since said date.

Plaintiff further avers that any application of Henry L. Tanner made subsequent to A. D. 1869 to the probate judge for a deed to said premises was without authority of law, and subsequent to any interest in said premises possessed by the probate judge of Lewis and Clarke county, Montana Territory, and at a time when no power, right, or authority existed in the probate judge of said county under the law to execute a deed to said premises to any person, and subsequent to a deed having been duly executed by the probate judge to said premises.

And plaintiff further avers that if any deed was made by the probate judge of Lewis & Clarke county, Montana Territory, to Henry L. Tanner or any other person it is null and void and of no effect, and passed no title or interest in any portion of the premises described in plaintiff's complaint.

12 Plaintiff further avers that said Henry L. Tanner never was in the possession of said premises mentioned in plaintiff's complaint and never had any improvements on or interest in said premises.

Plaintiff denies that any person or persons (save and except this plaintiff, her grantors and predecessors in interest) ever had any possession of the premises described in plaintiff's complaint from the year 1869 up to the 4th day of October, A. D. 1877.

Plaintiff denies that defendant ever had any predecessors in interest in said premises, and denies that defendant, or any one from whom he claims title, had any possession of any portion of said premises previous to the 4th day of October, A. D. 1877.

Plaintiff denies that defendant entered or took possession of said premises under claim of title, but avers the fact to be that said defendant, previous to and at the time he took possession of said
13 premises, well knew that this plaintiff owned and possessed
the same.

Plaintiff denies that said defendant has erected valuable improvements on said premises, or any improvements of greater value than one thousand dollars, and avers that the damages this plaintiff has sustained in the loss and enjoyment of the use of said premises, by the wrongful acts of the defendant in taking possession of said premises and detaining them from plaintiff, far exceeds the amount of the value of the improvements placed thereon by defendant.

Plaintiff denies that the defendant, or his grantors or predecessors in interest, or either or all of them, have been in the exclusive or actual possession of said premises since February, A. D. 1873, and deny that he, or any one from whom he claims title, ever had any possession of said premises until October 4, 1877.

Plaintiff denies that she is barred from maintaining an action for the recovery of the said premises under the provisions 14 of chapter II of title III of the Code of Civil Procedure, approved February 16, A. D. 1877, and denies that she is barred from maintaining this action under chapter 41 of the laws of Montana Territory; and denies that she is barred from maintaining this action under any law of the Territory of Montana.

Plaintiff denies that any person (save and except the defendant) has ever been in the adverse possession of said premises, and the defendant only from the 4th day of October, A. D. 1877.

Wherefore plaintiff demands judgment as in complaint prayed for.

SHOBER & LOWRY,
Plaintiff's Attorneys.

TERRITORY OF MONTANA, }
Lewis & Clarke County, } *ss:*

John H. Shober, being duly sworn, says: He is one of the attorneys for the plaintiff in the above-entitled cause, and that he has heard read the foregoing replication, and knows the contents 15 thereof, and that the facts stated in said replication are true, to the best knowledge, information, and belief of this affiant; that the reason why this verification is made by this affiant is that said plaintiff is absent from the county where her attorneys reside.

JOHN H. SHOBER.

Sworn to and subscribed before me, this 24th day of November, A. D. 1879.

JOSEPH K. TOOLE,
Notary Public.

And thereafter, on the 26th day of March, A. D. 1880, being one of the term days of the March term, A. D. 1880, of said court, this cause was brought to trial. A jury was impanelled and sworn to try the same, and before whom said trial was had; Honorable Decius S. Wade, judge, presiding.

16 In District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

ELLEN SULLIVAN, Plaintiff,
vs.
ELIJAH M. DUNPHY *et al.*, Defendants.

This cause was brought to trial on the 26th day of March, A. D. 1880, before Hon. D. S. Wade and a jury.

Plaintiff's Testimony.

J. H. MOE was sworn as a witness on the part of the plaintiff, and testified as follows:

I am the register of the U. S. land office in Helena, M. T.

Ques. What was the date of the entry of the Helena town site?

(Objected to. Patent itself is the best evidence, or, after proof of its loss, a certified copy.)

Objection overruled, and def'ts excepts, as follows:

Defendants' Bill of Ex. No. 1.

(Title of Cause.)

17 Be it remembered that on the 26th day of March, A. D. 1880, that being one of the days of the March term of said court, the plaintiff, to sustain the issues on her part, called as a witness J. H. Moe, who testified that he was register of the land office, and that the plaintiff then offered in evidence a book of the land office in Helena, the same being an abstract of entries of land in said district. To the introduction of which the defendant objected, for the reason that the same was not competent evidence to establish the conveyance of land by the United States to any person.

The court overruled the objection and allowed the entries in said book to be read, and the same were read in evidence; which entries were as follows:

MARCH 2, 1869.—	Truett—	S. W. ¼ S. W. ¼ sec. 30.
	Probate Judge—	N. W. ¼ sec. 31, T. 10 N., R. 3 W.
	Lewis & Clarke—	S. E. ¼ S. E. ¼ sec. 25.
		E. ½ N. E. ¼ sec. 36, 10 N. 4 W.
SEPT. 14, 1869.—	Do.	S. E. ¼ S. W. ¼ sec. 30, 10 N., 3 W.

To the ruling of the court & the introduction of which in
18 evidence the defendant then and there excepted, and asks the court to sign this bill of exceptions, which is done this 26th day of March, 1880.

D. S. WADE, *Judge.*

The witness answered: The first entry was March 2, 1869—S. W. ¼ S. W. ¼ sec. 30, N. W. ¼ sec. 31, T. 10 N., R. 3 W.; S. E. ¼ S. E. ¼ E. ½ N. E. ¼ sec. 36, T. 10 N., R. 4 W.

The second entry of forty additional acres, allowed by the Commissioner, was upon Sept. 27, 1869, and was the S. E. ¼ S. W. ¼ sec. 30, T. 10 N., R. 3 W. I read from the abstract and cash entries of land sold.

Ques. Is it an abstract?

Ans. Yes; it shows the date of application, to whom sold, and the tract. It does not show whether a patent was issued.

The receiver's receipt is next in order.

Certain proofs are made & the patent issues. The receipt is issued in duplicate; one goes to the Department in Washington, the other is given to the purchaser, and he surrenders it when the patent issues.

19 By the COURT: What is the process of getting a title to a town site?

Ans. The probate judge files a declaratory statement. We issue a notice for thirty days. At the expiration of the thirty days, on proving the number of inhabitants, the improvements, that the tract is not in a military reservation, etc., we allow the entry. We then give the probate judge a duplicate receipt. No paper is issued until the patent. (See Bill of Ex. No. 1.)

N. HILGER, called as a witness for plaintiff, being sworn, testified:

I have lived in the county of Lewis & Clarke since December 1, 1871. I was probate judge for four years. The patent for the Helena town site from the United [States] came a year or two after I was in office. I took it to the recorder's office to have it recorded. After it was recorded I do not know what was done with it. I think I left it there as a safe place. I saw it last when I handed it to the recorder. That was after I had been in office for some time. 20 I think Mr. Ellis was then recorder. I think he is now out of Montana. I heard he was in St. Louis. The next recorder was John Heldt. He went out as I came in.

Cross-ex.:

It must have been a year or two after I went into office that I left the patent for record. When I turned over the effects of the office to Judge Hedges I do not remember any patent.

CORNELIUS HEDGES, called as a witness for plaintiff, & being sworn, testified as follows:

I am now probate judge; have been for over four years; my predecessor was N. Hilger. I received the records from him. I have never had the Helena town site patent in my possession. I have moved and handled all the papers of the office and have not discovered it.

Cross-ex.:

I have to some extent made search for it. I cannot swear that it is not in the office. I have made search at two different 21 times, but not as thoroughly as might have been. Can't swear positively that it is not there.

O. B. TOTTEN, called as a witness for the plaintiff, being sworn and examined, testified as follows:

I am county clerk & recorder of Lewis & Clarke county, Montana Territory, and have been for over four years. The Helena town site patent was recorded. I have never seen it in overhauling the papers of my office. There are a great many papers in the office. I think I have been asked about the patent, and I said I had never come across it.

Cross-ex.:

I have never searched the office for this purpose. I cannot state whether or not the patent is there.

Plaintiff offers the record of the Helena town site patent. Defendant objects on the ground that the loss is not sufficiently proved. Objection overruled. Defendant excepts as follows, to wit: 22

Def'ts' Bill of Exceptions No. 2.

(Title of Cause.)

Be it remembered that on the 26th day of March, 1880, that being one of the days of the March term of said court, this cause came on to be tried, whereupon the plaintiff introduced as witness*es* N. HILGER, who testified that he was probate judge of said county from the year 1871 for four years, to December, 1875; that as and while he was such probate judge he had in his possession a patent from the United States to M. F. Truett, probate judge; that he gave such patent to the recorder of said county to be recorded, and that he has never since seen it; that C. S. Ellis was at that time the recorder of said county.

C. HEDGES testified that he was probate judge from the time Judge Hilger's term expired; that he was still such probate judge; that he had several years since searched for the patent, and that he could not find it.

23 The plaintiff then called Mr. TOTTEN, who testified that he is now recorder; that he has never made any special search for the patent in his office; that he had not looked over all the papers in his office, and would not swear that it was not in his office, but that he had never seen it.

The plaintiff then offered in evidence a record of said county, being the book of records marked "book U. S.," and what appeared on page 93, purporting to be a patent of the United States, and which is as follows, viz:

E.

Patent.

Certificate No. 41.

The United States of America to all to whom these presents shall come:

United States to Mires F. Truett, probate judge, Greeting:

Whereas Mires F. Truett, probate judge of Lewis & Clarke county, Montana Territory, in trust for the several use and benefit of the occupants of the town site of Helena according to their respective interests, by virtue of an act of Congress, approved March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," has deposited in the General Land Office 24 of the United States a certificate of the register of the land office at Helena, Montana Territory, whereby it appears that full payment has been made by the said Mires F. Truett, probate judge as aforesaid, in trust as aforesaid, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the south half of the southwest quarter of section thirty, and the northwest quarter of section thirty-one, in township ten north, of range three west; the southeast quarter of the southeast quarter of section twenty-five, and the east half of the northeast quarter of section thirty-six, in township ten north, of range five west, in the district of lands subject to sale at Helena, Montana Territory, containing three hundred and forty-seven acres and thirty hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office *of* the surveyor general, which said 25 tracts have been purchased by the said Mires F. Truett, probate judge as aforesaid in trust as aforesaid:

Now, therefore, know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said Mires F. Truett, probate judge as aforesaid, in trust as aforesaid, and to his successors, the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Mires F. Truett, probate judge as aforesaid, in trust as aforesaid, and to his successors and assigns in trust as aforesaid; subject to any vested and accrued water rights for mining, manufacturing, agricultural, or any other purposes, and rights to ditches and reservoirs, and in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and 26 also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Ulysses S. Grant, President of the United

States of America, have caused these presents to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the sixteenth day of June, in the year of our Lord one thousand eight hundred & seventy-two, and of the Independence of the United States the ninety-sixth.

By the President:

U. S. GRANT,
By J. PARRISH,
Secretary.

C. B. BOYNTON,
Recorder of the Gen'l Land Office.

Recorded vol. L, page 2.
Filed & recorded April 18, 1873.

CHAS. F. ELLIS,
Co. Recorder.

27 To the introduction of which the defendant objected. The court overruled the objection, and the same was read in evidence; to which ruling of the court and the reading of the same in evidence the defendant then and there excepted.

D. S. WADE, *Judge.*

HEDGES, recalled, testified:

I remember to have made a special search for the patent, but perhaps did not look at every paper which, from its shape, I thought could not be the patent; I have not looked at every paper in the office, but have looked at every one which I thought could be the patent; I opened the packages of papers.

Plaintiff introduced book U. S., page 93, record of patents of U. S. to probate judge of Helena town site. Def't excepted. (See bill of Ex. No. 2.)

28 Plaintiff introduced application book "A" of records of probate judge office and maps of Helena town site.

Lot 8, block 30, was entered by Wan Lee. Application 501.
Ques. Were not the applications made in writing?
Ans. Yes.

Defendant objects to the introduction of the application book, as it is only a copy of the original application, and also the map.

By the COURT: Plaintiff must produce the original application. The map is allowed.

Def't excepts as follows:

Def'ts' Exception No. 3.

(Title of Cause.)

Be it remembered that this cause came on to be tried on the 26th day of March, that being one of the days of the March term, 1880, of said district court. The plaintiff offered in evidence a map, purporting to be a map of the town of Helena, which contained written thereon the following certificate, viz:

(Here insert.)

29 Map, with endorsements.

30 The defendant objected to the introduction of the same in evidence, on the ground that the same was not duly and properly authenticated; that it nowhere is shown that it is the original map approved by the county commissioners, and that the same is incompetent as evidence.

The court overruled the objection, and permitted the same to be introduced and given in evidence to the jury; to which ruling of the court the defendant then and there excepted.

The plaintiff then offered in evidence an application of Wau Lee to the probate judge for title to the lot in dispute, which said application is as follows, viz:

Application of Wau Lee.

No. 501.

To the probate judge of Lewis & Clarke county:

The undersigned, a citizen of the town of Helena, county of Lewis & Clarke & Territory of Montana, on oath makes the following statement, to wit:

31 That on or about the —— day of ———, A. D. 18—, lot number 8, in block number 30, as laid down in the map of the town of Helena, county and Territory aforesaid, being 25 feet front on Main street and 116 feet deep, and situated on the west side of Main street in said town, was located, settled upon, and occupied by ——— ———, who was then a resident of said county and Territory.

That the said ——— ——— conveyed all of — right, title, and interest in and to the said lot number 8 aforesaid to ——— ———, as will appear by a certain instrument in writing, on the — day of ——, A. D. 18—, and was by ——— ——— conveyed to Wau Lee.

That the improvements on said lot were made on or about the — day of ——, A. D. 1867, and consist of dwelling, wash-house, and are of the value of two hundred and fifty dollars.

That the value of said lot is about the sum of one hundred and twenty dollars; and that the said lot is now actually possessed and occupied by Wau Lee; that the right to such occupation and
32 possession is in him solely.

TERRITORY OF MONTANA, } *ss:*
County of Lewis & Clarke, }

Wau Lee, being first duly sworn, deposes and says: That he has heard read the foregoing statement and knows the contents thereof, and that he believes the same to be true.

his
WAU x LEE.
mark.

Subscribed and sworn to before me, this 26th day of March, A. D. 1869.

H. ADDOMS,
Probate Clerk.

Filed & recorded on the 26th day of March, 1869.

HENRY ADDOMS,
Probate Clerk.

The defendant objected to the introduction of the same. The court overruled the objection, and the defendant then and there excepted.

The said application was then read in evidence. The plaintiff then offered in evidence a deed from the probate judge to Wau Lee, dated 18th September, 1869, for the lot in dispute, which is as follows, to wit:

33 *Deed.*

Probate Judge to Wau Lee:

This indenture, made the eighteenth day of September, in the year of our Lord one thousand eight hundred and sixty-nine, between M. F. Truett, probate judge of Lewis & Clarke county, M. T., and Wau Lee (Chinaman), of Helena county and Territory aforesaid, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of four ($4.00) dollars, lawful money of the United States of America, to him in hand paid by the said party of second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quitclaimed, and by these presents does remise, release, and forever quitclaim, unto the said party of the second part and to his heirs and assigns all that certain lot, piece, or parcel of land situate, lying, and being in the town of Helena, county of Lewis & Clarke and Territory of Montana, and bounded and particularly described as follows, to wit: Lot number eight (8), in block number thirty
34 (30), being twenty-five feet front on Main street and one hundred and twelve (112) feet deep; said lot being twenty-five (25) feet wide on the rear or westerly end, bounded northerly by property of Patrick McCann, easterly by Main street, southerly by property of Walker & Bro., and westerly by property of P. McKnight. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion & reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

This conveyance is made subject to the *bona fide* rights of miners

possessed of mining ground within the limits above named
35 on the 26th day of February, A. D. eighteen hundred and sixty-nine.

In witness whereof the said party of the first part has hereunto set his hand and seal, the day and year first above written.

M. F. TRUETT, [SEAL.]
Probate Judge.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

On this eighteenth day of September, in the year of our Lord one thousand eight hundred and sixty-nine, before me, the undersigned, ——— in & for said county, personally appeared the within-named ———, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the individual described in and who executed the said annexed instrument, and who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above
36 written.

[SEAL.] HENRY ADDOMS,
Notary Public.

Filed and recorded on the 7th day of June, 1870, at 1 o'clock p. m.

W. B. MORRISON,
County Recorder.

The defendant objected to the introduction of the same in evidence on the ground of its invalidity as a conveyance of the property, and that it was incompetent, it appearing that it was executed to a Chinaman, a person not allowed by law to become a citizen of the United States.

The court overruled the objection and the said deed was read in evidence.

To which ruling of the court the defendant at the time excepted.

D. S. WADE, *Judge.*

A. J. FISK, sworn and examined as a witness on part of the plaintiff, testified as follows:

Notice of entry of Helena town site was published in "He-
37 lena Herald" for sixty days, commencing March 9, 1869.

Court adjourned to March 27, 9 a. m.

MARCH 27—9 a. m.

Parties and attorneys being in court the plaintiff introduced a paper which she claims to be the original application, number 501, by Wau Lee for lot 8, block 30.

Defendant objects.

The application purports to be made by a Chinaman; it is irregular and defective in almost every respect.

Objection overruled.
Defendant excepts.
(See bill of ex. No. 3.)

Plaintiff offers in evidence a deed from M. F. Truett, probate judge, to Wau Lee, Chinaman, for lot 8, block 30, Helena town site.

Defendant objects.
Overruled, and defendant excepts.
(See bill of ex. No. 3.)

PATRICK McCANN, sworn and examined on part of plaintiff, and testified as follows:

38 In 1869 I resided in "Trinity Bar." I came to Montana in 1863. I am acquainted with lot 8, block 30, in Helena town site. I lived in the house next to it in 1869.

Ques. Did you ever purchase or own lot 8, block 30?

Defendant objects. Deed is best evidence.
Objection overruled.
Defendant excepts as follows, to wit:

Def'ts' Bill of Exception No. 4.

Be it remembered that on the 27th day of March, A. D. 1880, and during the trial of this cause the defendant offered in evidence a deed purporting to have been executed by Lum Sing to P. McCann for the property in dispute, which deed is as follows, viz:

Deed. Lum Sing to P. McCann.

This indenture, made the thirtieth day of September, in the year of our Lord one thousand eight hundred and sixty-nine, between Lum Sing, of the city of Helena, county of Lewis & Clarke, Territory of Montana, and Patrick McCann, of the same place, the party of the second part, witnesseth: That the said party of the first 39 part, for and in consideration of the sum of six hundred and twenty-five (no 100) dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents does remise, release, and forever quit-claim, unto the said party of the second part, and to his heirs and assigns, all that certain lot, piece, or parcel of land situate, lying, and being in the city of Helena, county of Lewis & Clarke, Territory of Montana, and bounded and particularly described as follows, to wit: Lot No. (8) eight, in block (30) thirty, on lower Main street, and bounded on the south by Walker & Brother's lumber-yard, and on the north by Pat. McCann's butcher-shop, said lot being the second lot from the corner of Edwards street, on Main, and on the west side of Main street, & known as the Wau Lee China wash-house. Said property appears

upon the probate judge map legally authorized and upon record, and endorsed by the commissioners of this county
40 as lot 8, in block No. (30) thirty, containing 2,500 feet; that
is, 25 feet front on Main street, and running back (110) one hundred and ten feet, and bordering upon said Walker's lumber-yard. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, and interest in and to the said property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the said premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

his
LUM x SING. [SEAL.]
mark.

Signed, sealed, & delivered in the presence of—
41 A. B. BABCOCK.
BEN. S. WORD.

[50c. Rev. Stamp cancelled.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, } *ss:*

On this 18th day of September, A. D. 1869, personally appeared before me Lum Sing (Chinaman), and personally known to me to be the same person, who duly acknowledged that he executed the within instrument for the uses & purposes therein expressed.

[SEAL.] A. B. BABCOCK,
Notary Public.

N. B.—The alteration of the depth of lot from 100 to 110 feet was altered by consent of both parties before the execution of the instrument.

A. B. BABCOCK,
Notary Public.

Filed & recorded June 7, 1870, at 2 p. m.
W. B. MORRISON, *Rec'r.*

To the introduction of which the defendant then and there objected. The court overruled the objection and the defendant excepted. The said deed was then read in evidence.

42 The plaintiff then placed P. McCANN on the stand as a witness and asked him the following questions:

Ques. When you bought this property who was in possession of the property?

The witness answered that Lum Sing was in possession.

Ques. How long had he been in possession?

The question was objected to by the defendant. The court overruled the objection, and the defendant duly excepted.

The witness answered: I saw him around there since 1867.

Ques. What deeds had you to the lot?

Question objected to. Objection overruled, and defendant excepted.

Ans. There was a deed from Wau Lee to Lum Sing, dated about 25th Sept., 1869. It was for lot 8, in B. 30, signed by Wau Lee, by his mark, and in Chinese language. It was in Babcock's office, who made the deed from Lum Sing to me. The deed was made out like other deeds to me. I think it was acknowledged, but don't
43 remember before whom it was acknowledged. I think I
gave the deeds to Mr. Sweeney and have not been able to find them.

The question and answer were both objected to at the time, but the objection was overruled, and the defendant duly excepted.

The defendant objected to proof of contents of the supposed deed from Wau Lee to Lum Sing, for the reason that there was no foundation laid to justify such evidence; that the evidence did not establish that any deed had ever been properly executed, or that it was ever in existence, and moved the court to strike out the evidence of said McCann in reference in reference to the contents of said instrument and all relating to said deed. The court overruled said motion, and the defendant then and there duly excepted.

The following amendment to bill of exception No. 4 is allowed, to wit: "That at the time of the introduction of the evidence concerning the deed from Wau Lee to Lum Sing, it was then stated
44 by plaintiff's attorneys that they expected to prove the execution, delivery, and loss and contents of said deed. And afterwards evidence was introduced tending to prove the same. (See evidence of McCann, Sweeney, and Babcock.)

D. S. WADE, *Judge*.

Ques. When and of whom did you buy it?

Def't objects. Overruled. Exception.

(See bill of exception No. 4.)

And how much did you pay for it?

Def't objects. Objection sustained.

Ques. At the time you purchased it what title deeds did you receive?

The following deeds were here handed to witness for inspection, to wit:

M. F. Truett to Wau Lee, Lung Sing to Patrick McCann, Patrick McCann to Ellen Sullivan.

(For copy of deed from M. F. Truett to Wau Lee, see def'ts' bill of

Ex. No. 3, *ante*. For copy of deed from Lum Sing to Patrick McCann, see def'ts' bill of Ex. No. 4, *ante*.)

The following is a copy of deed — Patrick McCann to Ellen Sullivan:

45 *Deed. Patrick McCann to Ellen Sullivan.*

This indenture, made this second day of August, in the year of our Lord one thousand eight hundred and seventy, between Patrick McCann, of the city and county of Champaign and State of Illinois, party of the first part, and Ellen Sullivan, of the same place, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the love and affection, & of one dollar in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said party of the second part, her heirs and assigns, all the following-described lot, piece, or parcel of land situated in the city of Helena, in the county of Lewis & Clarke and Territory of Montana, to wit: Lot number eight (8), in block thirty (30), on lower Main street, and bounded on the south by Walker Brothers' lumber yard, and on the north by Patrick McCann's butcher shop, said lot being the second lot
46 from the corner of Edwards street on Main and on the west side of Main street, and known as the Wau Lee China washhouse. Said property appears upon the probate judge's map legally authorized and upon record, and endorsed by the commissioners of this county as lot eight (8), block No. thirty (30), containing 2,500 feet; that is, twenty-five (25) feet frontage on Main street and running back 110 feet, and bordering upon the said Walker's lumber yard. Also the following piece or parcel, lying and being in the city of Helena, county of Lewis & Clarke, Territory of Montana, to wit: Lot No. nine (9), in block No. thirty (30), being thirty (30) feet front on Main street and one hundred and ten (110) feet deep, said lot being seventeen (17) feet wide on the rear or westerly end, and being situated on the west side of Main street, and bounded northerly by property of C. Armbrecht, easterly by Main street, southerly by property of Chinamen, and westerly by property of P. McKnight.

47 Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of said party of the first part, either in law or in equity, of, in, or to the above-bargained premises, with the hereditaments and appurtenances. To have and to hold the said premises above bargained and described with the appurtenances unto the said party of the second part, her heirs and assigns, forever. And the said Patrick McCann, the party of the first part, for himself and his heirs, executors, and administrators, does covenant, bargain, grant, and agree to and with the said party of the second part, her heirs and assigns, that at the time of the ensealing

and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasa- 48 ble estate of inheritance in law and in fee-simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, and nature soever, and the above-bargained premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof the said party of the first part shall and will warrant and forever defend.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

PATRICK McCANN. [SEAL.]

[50c. Rev. Stamp, cancelled.]

STATE OF ILLINOIS, *Champeign County:*

I, John W. Shuck, clerk of the county court in & for said 49 county, in the State aforesaid, do hereby certify that Patrick McCann satisfactorily proved to be the person described in and who executed the within deed by the oath of Cornelius Ryan, a competent & creditable witness for that purpose, and by me duly sworn, and he, the said Patrick McCann, acknowledged that he signed, sealed, and delivered the said instrument in writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal, this 3d day of August, A. D. 1870.

J. W. SHUCK,
Co. Clerk.

Filed & recorded August 13, 1870, at 1.30 p. m.

W. B. MORRISON,
Co. Rec'r,
Per BEN. S. WOOD, *Deputy.*

Witness resumed:

I received these deeds, and also one from Wau Lee to Lum 50 Sing, which I saw in Mr. Babcock's office.

Defendant objects to introduction of deed from Lum Sing to Patrick McCann.

Deed was introduced and read in evidence.

(Def't excepts. See bill of ex. No. 4.)

Ques. When you bought the property who was in possession of it?
Def't objects. Objection overruled, and defendant excepts. (Bill of ex. No. 4.)

Ans. Lum Sing.
Ques. How long had he been in possession?

Def't objects. Evidence is immaterial. Overruled, & def't excepts. (Bill of ex. No. 4.)

I saw him around there since '67. When I received these deeds none of them had been recorded. I examined the deed from Wau Lee to Lum Sing. The deeds were in Babcock's office. I paid over the money and Babcock gave it to Lum Ling. I took the deeds to be recorded. In December I handed all these deeds to Mr. Sweeney.

(To the above testimony def't excepts.)
(Bill of exception No. 4.)

51 Ques. What became of the deed from Wau Lee to Lum Sing?

Def't objects. (See Bill of ex. No. 4.)

Ques. What was the date of the deed from Wau Lee to Lum Sing?
Ans. About the 25th September, 1869.

By the COURT: Before whom was it acknowledged?
Ans. Babcock was making the papers. He had all the deeds. Babcock made the deed from Lum Sing to the lot.

McCANN: I took up all the deeds. I examined the deeds, and thought it was made out the same as other deeds. Don't remember whether there was a certificate of acknowledgement. Babcock said they were all right. Sweeney was present in Babcock's office when I bought the property; and I think Truett, probate judge; Babcock, and Lum Sing were there.
Ques. What property did the deed from Wau Lee to Lum Sing purport to convey?

Def't objected. Objection overruled. Def't excepts. (Bill of ex. No. 4.)

Ques. How did it read?
52 Ans. Can't recollect. It read the same as any form of a deed—the same as the one Babcock made to me. The ground was lot 8, block 30. The deed was signed "Wau Lee."
By the COURT: How was it acknowledged?

Ans. It was acknowledged, but I forgot before whom.
Ques. Where did you see it last?
Ans. Where I paid the money I took all the papers and went home. Six months later I was going to the States, and I brought all the papers to Sweeney and told him to take care of them. In May I wrote to Sweeney to have him record the same. The deed from Wau Lee to Lum Sing was lost. I hunted for it and could not find it. I bought the property in September, 1869, and left for the States in November or December, 1869. I deeded this property to Ellen Sullivan.

(Paper here produced & shown witness.)

WITNESS: This is the deed.

Def't objects to the introduction of all these deeds. Objec-
53 tion overruled by the court, and the defendant excepts.
(See bill of exceptions No. 4.)

WITNESS: In 1875 Ryan was my sister's agent. After Ryan Shroyer took charge of the property. Shroyer turned it over to Hoyt. Hoyt had charge of it up to 1878. When I took the deed from Lum Sing I went down and he gave me the key. I leased it and Sweeney received the rents. He rented to Lum Sing. I received the rents up to 1870, and Ellen Sullivan from that time up to 1874, through Sweeney. The building was a log house, 16x24 feet, and was occupied as a wash-house. I have been my sister's general agent since the conveyance. I went into the possession of lot 8 under the deed from Lum Sing to me upon the same day of the execution of the deed, and continued in possession by myself and through my agents until I sold to Ellen Sullivan, at which time she entered into possession of lot 8 under the deed from me to her.

54 Plaintiff here offered in evidence a receipt for taxes paid on the property by plaintiff, to which the defendant objects. The court reserves its decision.

Defendant moves to strike out all of McCann's evidence relating to the deed from Wau Lee to Lum Sing.

Motion denied by the court. Def't excepts.

(See bill of exceptions No. 4.)

Cross-examination:

I came to Helena in 1864. I owned and lived on the lot adjoining lot 8, in block 30. I lived there in 1865, and in 1866 for a while. In 1867 I built the log house. I occupied or rented it up to 1869.

Ques. When you bought from Lum Sing were you not having trouble about the division line between the two lots?

Ans. Not that I know of.

Ques. Did you know Wau Lee?

55 Ans. No. I do not know when he left the wash-house. I had seen Lum Sing in the wash-house. I knew him when I saw him. I saw him on and off. I saw him there in the winter of 1868 and when I came into town.

Ques. Did you make this trade yourself or through an agent?

Ans. I told Owen Williams I would give $650.00 for it. Some one sent word to me and I came in. Owen Williams sent me word. The deed was made in Babcock's office. Lum Sing came to Babcock's office from the wash-house. He had the deeds in his hands. There were three deeds and one from Lum Sing to me. I gave the deeds to Sweeney, loose. I read the deeds in Babcock's office. I did not read them again until after they were recorded. I knew there were four, and I handed the papers to Sweeney. I returned to Helena in 1879. From 1869 until I returned in 1879 I did not of my own knowledge know who was in possession of the property, but only from letters.

56 Ques. What do you understand by an acknowledgement?

Ans. I would look where the notary public seal was. I saw a notary public seal. Do not know whose it was. Have forgotten. I know it was acknowledged.

Ques. How did it read?

Ans. Duly acknowledged before so & so. Signed and acknowledged before so & so. I do not remember the words, nor whether there were any witnesses. Wau Lee signed by a mark and in Chinese. I can't say whether his mark was witnessed. Don't exactly recollect the consideration.

The date of the deed from Lum Sing was after September 20, 1869.

Ques. How long after probate judge's deed?

Ans. Probate judge's deed was in September, 1869. I have not seen it very much. I have seen them since I have been here. Have seen them right along. I saw it at the time and read it.

James M. Ryan, called, sworn, and examined on the part of the plaintiff, and testified as follows, to wit:

57 I was agent for Mrs. Sullivan at the request of McCann, in 1875, for five months from May until fall. I thought I was acting for McCann. There was a log cabin on the premises. I had possession of that log cabin until September or October. It was occupied part of the time by Bob Ditlaye for $10 or $12.00 a month. When Ditlaye did not occupy it, I think it was open. It was very dilapidated. I turned the property over to Shroyer. He took the possession from me at the request of McCann. Do not know how long he had possession. No one had possession except under me while I had charge.

Cross-ex.:

The building was broken down and dilapidated. The first I knew of it was when I took possession. Ditlaye was in when I gave up the property.

John Sweeney, called, sworn, and examined on the part of plaintiff, testified as follows:

58 I am acquainted with lot 8 in block 30. I have been since April, 1865, before the survey was made. I am acquainted with McCann, and have met Ellen Sullivan once. I acted as agent for McCann and Mrs. Sullivan for this property. I commenced so acting in 1868; think it was in 1867. I took possession of the property on the day McCann purchased it. I looked after it and collected the rents. In 1870 McCann sold it to Ellen Sullivan, and I collected the rents and sent them to her until the 18th or 20th of January, 1874. While I was in possession, I leased to Chinamen from August or September, 1869, to some time in 1872 or 1873. I rented it to some pilgrims for a short time, and then nailed it up. No one attempted to take possession while I had it.

Ques. Who paid the taxes?

Def't objects. Overruled. Def't excepts.

Ans. I paid the taxes up to 1873. I quit acting as agent

59 between the 15th & 18th of January, 1874.

Ques. Did you ever, as agent, authorize any one to break in the doors and windows of the place?

Def't objects. Objection sustained.

Ques. Did you ever break them open or cause them to be broken open?

Ans. Never, sir. I had the deeds of this property in my possession. McCann gave me a lot of papers, saying they were the deeds of his property, and asked me to take care of them. I was with McCann when he bought the lot.

Ques. Do you know anything of the deed from Wau Lee to Lum Sing? Did you examine the deeds making the chain of title?

Ans. I did not.

Ques. Do you know anything of the deed from Wau Lee to Lum Sing?

Ans. No. I had only a bundle of papers. I put these deeds in
my safe. I kept them there until 1870. I had them recorded.
60 Don't remember what they were; but I had them
all recorded.

Cross-ex:

I first became acquainted with this property in 1865. The log cabin was put up in March, 1865. In 1866 it first became a washhouse. I knew Wau Lee up to some time in the fall of 1870, or January, 1871.

Ques. From the Chinaman whom you first knew, was there any change in the Chinamen on the premises?

Ans. I saw the Chinaman who received the money. That was Lum Sing. I can't say how long he had been there. I imagined he had been there from the start. I think the first Chinaman there was Wau Lee. I don't know whether he was there in September, 1869. I had seen Lum Sing there for two years before McCann's purchase, but had had nothing to do with him. McCann asked me to go and see if the papers were all straight. I did not look them over.
I referred the matter to Mr. Babcock. I did not see the deed
61 from Wau Lee to Lum Sing. I can't say how many deeds I
took to be recorded. I know Henry A. L. Tanner. I do not
know of his being in there. The building was not in good repair. I examined none of the papers, and do not know the number of the deeds.

Redirect:

Babcock was a real estate agent; his office was on Broadway During my agency no one else had any possession except under me and as tenants of Mr. McCann or Mrs. Sullivan, nor did any one claim possession, or right of possession, except as such tenants, to my knowledge. If any one had been in possession of lot 8, except as tenants under me, while I was agent, I would have known it, as the property is situate just opposite my place of business on Main street, where I saw it every day; while I was agent I paid the taxes on lot 8.

Patrick McCann, recalled and testified:

62 I did not know Wau Lee personally; I did not know of the probate judge deed until it was handed to me.

Court adjourned to March 29, 9 a. m.

March 29—9 a. m.

Court convened & trial proceeded.

A. B. Babcock called, sworn, and examined on the part of the plaintiff, and testified, viz:

In 1869 I lived in Helena; I was a real estate agent; I was acquainted with Patrick McCann and the property in question in 1869; I attended to the sale of that property at that time.

(Here a paper was handed witness.)

Witness: I had that deed in my office at one time; it is in my handwriting, and has my notarial seal; I remember the execution of the deed from Lum Sing to Patrick McCann; I was a conveyancer; the transaction was negotiated by me.

Def'ts' Bill of Exception No. 5.

(Title of Cause.)

63 Be it remembered that on the 29th day of March, 1880, the plaintiff called as a witness A. B. Babcock, who testified that in 1869 he was a real estate agent and conveyancer in Helena; that he drew the deed from Lum Sing to plaintiff; that when he drew the deed he examined the other deeds which were brought there by Lum Sing and McCann, and found the title in Lum Sing. The plaintiff then asked witness the following question:

Ques. State whether or not there was among these deeds a deed from Wau Lee to Lum Sing.

The question was objected to as leading, and that no foundation had been laid for the introduction of parol evidence.

The court overruled the objection, and the defendant excepted, and the witness testified:

That there was a bill of sale or deed which was drawn and acknowledged by Judge Lawrence from Wau Lee to Lum Sing—the one who signed the deed to Lum Sing. Judge Lawrence was a notary public, and I remember his notarial seal to the acknowledgement of the deed. 64

The defendants excepted to the answer of the witness.

The plaintiff then asked witness what was the purport of the deed or bill of sale from Wau Lee to Lum Sing, it having been previously shown that the deed was lost by other witnesses, and Babcock himself having testified that he had searched for the deed and could not find it.

The question was objected to by defendant.

The court overruled the objection, and the defendant then and there excepted.

The witness answered that it was a bill of sale or deed from Wau Lee to Lum Sing. That it was signed with a mark and witnessed, but that he did not know what the purport was.

The defendants excepted also to the answer.

The plaintiff then called S. C. ASHBY as a witness, who testified as follows, under objection by defendant to the testimony:

65 S. C. ASHBY: I know the lot in dispute—8, in B. 30. I was assessor in '73 & '74, '75 & '76 & '77 & '78.

Plaintiff then asked: Who was the agent of this property in 1873?

Defendant objected to the question. The court overruled the objection, and the defendant excepted.

Witness answered: J M. Sweeney & others.

The question was then asked: Who gave in the lot for assessment?

Question was objected to. Court overruled the objection, & the defendant excepted.

Witness answered: It was given in by John Sweeney in '73 & '4, by R. Shroyer in '75, by E. M. Hoyt in '76 & '77. In 1878 Sweeney said the property was in dispute, and I listed it myself as assessor. Dunphy gave it in also; it was listed twice.

All of the above evidence was objected to, but admitted under objection, & the defendant excepted.

D. S. WADE, *Judge*.

66 Ques. Did you examine the other deeds in the possession of Lum Sing?

Ans. All the papers were produced in my office.

Ques. Was there or was there not in your possession at that time a deed from Wau Lee to Lum Sing?

Defendant objects. Objection overruled, and defendant excepts. (Bill of ex. No. 5.)

Ans. All the papers which came into my office—the purport of those papers. It was eleven years ago. There was a paper by Lawrence, as notary public—a deed from Wau Lee to another Chinaman—I don't know whom.

Above testimony taken under objection. (See bill of exception No. 5.)

Ques. From whom?

Ans. Wau Lee.

Ques. To whom?

Ans. Don't know. It was to the one whose mark (x) is on that deed. I do not distinctly recollect the purport of the deed, nor
what it conveyed. It was in reference to the property in
67 question. I do not know what became of it. I searched for

it on last Tuesday among Mr. Hoyt's papers, with whom I was in partnership in 1869. I do not remember the purport of that deed. It was drawn by Lawrence and was under his seal. When I made the conveyance I found the papers correct. The deed was signed with a cross (x). I had the ordinary acknowledgement.

Cross-ex.:

I knew Wau Lee; I had his property for sale in April, May, and June, 1869.

Ques. You knew Wau Lee?

Ans. Yes.

Ques. Was it not Lum Sing?

Ans. Yes.

Ques. Did you know Wau Lee?

Ans. Yes; there were two Chinamen; Wau Lee went to California.

Ques. Did you know Wau Lee, and did he put this property in your hands for sale?

Ans. That is what he called his name; it was not Lum Sing, but
a different one; Wau Lee gave it to me for sale in the fall
68 of 1869. I can't remember when I last saw Wau Lee; I first
saw him when he came to my office; I knew him so I could identify him; I did not see him when I drew the deed of Lum Sing to McCann; I knew Lum Sing; when I drew the deed Lum Sing and McCann came to my office; Benjamin S. Word, the clerk of the court, was present; I do not know of any one else who was there; Fisk may have been in; Owen Williams might have been there; John Sweeney or Owen Williams may have been there; I think one of them came in; the Chinaman and McCann brought the deeds there.

Ques. How many?

Ans. I think Truett's deed and a bill of sale from Lawrence.

Ques. Do you know anything of the existence of the deed from Wau Lee to Lum Sing?

Ans. Nothing except seeing the paper; I know nothing about it
except that they brought it there; I knew Lawrence'-signature
69 and notarial seal; I don't know the purport of the paper; I
know it was a bill of sale from Wau Lee to Lum Sing.

Ques. Was that all you knew of that paper, gathered only from inspecting the paper?

Ans. From this paper, which was then produced, I knew Lawrence's signature; I can't recollect the contents; the signature of the party executing it was a cross (x); I do not remember the name in English; I can't say whether it was witnessed; the name written by the cross (x) was Wau Lee.

Ques. What did you do with those papers?

Ans. McCann or Williams, or some one else, took them off; I could not find them. Lum Sing was the only Chinaman there.

Court adj'd to March 28, 9 a. m.

MARCH 28—9 a. m.

JAMES M. RYAN, desiring to correct his testimony of yesterday, testified:

WITNESS: I find, in ruminating upon the subject, that Ditlaye
occupied the adjoining cabin, and not the one on the prem-
70 ises in dispute. When I had the possession no one was in the
cabin on the land in dispute; I nailed up the cabin a little;
I made no other improvements; I saw the property daily when I
was in town. When I say no one had possession, I mean I saw no
one in there.

J. C. WALKER, called, sworn, and examined on the part of the plaintiff, testified as follows:

I am acquainted with the property in dispute, and have been since 1866. I knew Wau Lee. He came here soon after I occupied the adjoining property, and was there until 1869. I don't know what time. I think I knew Lum Sing, but I can't recall the individual. I purchased the lot where the Masonic building stands in 1866.

Cross-ex.:

Ques. Do you say that you knew Wau Lee?

Ans. Yes; that was the name he went by.

Ques. Do you not know that there was no Chinaman by the name of Wau Lee, but that a company went into those premises called Wau Lee?

71 Ans. I knew a Chinaman who went by the name of Wau
Lee. Wau Lee was also the name on the house. The busi-
ness was under the name of Wau Lee. I knew the head man. I
think I also knew Lum Sing. I was not so well acquainted with
him as with the manager.

Ques. Did you transact any business with him when he signed his name?

Ans. I don't know about his signature—signing his name; he washed for my men, and the business was in the name of Wau Lee.

S. C. ASHBY, being called, was sworn and examined on the part of the plaintiff, and testified as follows, to wit:

I am acquainted with the lot next to the Masonic Temple. I think it is lot 8, block 30. I have known it since I came to the town, and when I was assessor in 1873. I was deputy district assessor in 1873 & 1874 and 1875 & 1876. I was county assessor in 1876 & 1878.

72 Ques. Who was managing agent of the property in 1873?

Defendant objects. Objection overruled. Defendant excepts. (See bill of ex. No. 5.)

Ans. In 1873–'74 Ellen Sullivan was owner and John M. Sweeney agent. In 1875 it was listed as Mrs. Sullivan, owner, by Shroyer agent. In 1876 it was given in by Mrs. Sullivan, owner, E. M. Hoyt agent. In 1877 the same. In 1878 Sweeney said the property wa in dispute. E. M. Dunphy gave it in also. It was listed twice. Be fore 1878 it was not listed twice, to my recollection. The books will show.

The above testimony was taken under objection & ex. (See bill of ex. No. 5.)

OWEN WILLIAMS, called as a witness, and was sworn and examined on the part of the plaintiff, and testified as follows, to wit:

I knew Wau Lee a year or two, in a log house adjoining the Ma-
sonic Temple. I lived in the second house from the Masonic Temple,
now occupied by a Frenchman, adjoining the property in
73 question. I don't remember when Wau Lee left this place;
it may have been in 1869 or 1870. I can't say that I remem-
ber Lum Sing. I have been in that neighborhood twelve or thir-
teen years. After Pat. McCann bought the property he had posses-
sion. John Sweeney was his agent.

Cross-ex.:

There were five or six Chinamen there. When they bought from me it was in the name of Wau Lee. I knew the head Chinaman, by the name of Wau Lee. If they gave a fictitious name I did not know it. I dont remember Lum Sing. I got the name Wau Lee from these business transactions.

E. M. HOYT, called, and sworn and examined on the part of plaintiff, and testified as follows:

I am acquainted with lot 8, block 30. In the spring of 1876
McCann put it into my hands as agent for Ellen Sullivan. I had
charge of Ellen Sullivan's property for nearly two years, from
74 the spring of 1876 to January, 1878. I rented some of the
property during that time. I did nothing with lot 8, block
30. It was untena-table; no one resided in it; some one started
in there; he came in under another man who was claiming the
property; the one who started in there did not consult me; he was
in there two or three days. I put no improvements on this prop-
erty. I put a sidewalk in front of the two lots and paid for the
flume when it went through. I paid $20.00 for the flume and
charged it to Mrs. Sullivan.

By the COURT: Did you pay it on account of lot 8, block 30?

Ans. I can't say that I did. A year previous to my taking possession of lot 8, block 30, another party had taken the property and locked it up.

By the COURT: The testimony of Hoyt as to what he paid for the flume must go out of the case.

In the spring of 1877 I put a sidewalk before the two lots
75 8 & 9, in the same manner as I paid for the flume. No one
lived in lot 8 when I had it. Shroyer turned it over April,
1876. No one used lot 8 when I was in possession, except as a
general privy for people to run in. I paid the taxes in 1876 & 1877
for Ellen Sullivan on both lots.

Defendant objects to the testimony above included in brackets.

Ques. When did defendant enter the ground and take physical possession?

Ans. He started a wall in the fall of 1877.

Cross-ex.:

I first saw Dunphy on the land in 1877. I was agent for a year before that.

Ques. Do you know of his claiming the property before that, and when did he make a claim to you for the property?

Ans. Some time in 1877; probably the fore part of the year.

Ques. Who claimed the property before you went in?

Ans. Mr. Armitage for more than one year before I had
76 anything to do with it. Probably in the summer or early
spring, 1878, he took possession and locked it up; I took
charge about April, 1876; at that time I got no possession of the log building; it was locked up; Armitage left the key with me as his agent, and afterwards took it back; I never got the key as Ellen Sullivan's agent; I never forced a possession; the subject of my agency was lot 9 in block 30; so I considered it; the log cabin was six or seven feet below the level of the street; I never used it or rented it for Ellen Sullivan; Armitage was in possession, and had it locked; the sidewalk was built for lot 9; my office was adjoining; during the summer of 1875 I never saw any one in possession of lot 8; Ditlaye was on lot 9; since 1875 I know of no one in possession except Armitage and then Dunphy; I did nothing as agent in the
way of repairs; I nailed it up to keep people out of the privy
77 after Armitage locked it; I was then agent for Ellen Sulli-
van; I was Armitage's agent in 1875, before I was agent for
Ellen Sullivan; this was some time in the summer of 1875; I was agent for Armitage for only a short time; I was not his agent after he came back and got the key; I was his agent not over 30 days.

Redirect:

Ques. What acts of agency did you perform for Armitage?

Ans. I went and looked at the property; I did not charge him for it; the cabin was locked when I took it as agent for Ellen Sullivan.

Ques. Did any one apply to you to rent the premises when you were agent for Ellen Sullivan?

Def't objects. Objection overruled. Def't excepts.

Ans. Not that I remember.

Ques. Do you know Armitage?

Ans. Yes.

78 Ques. Did he and Sweeney come to you about renting the
premises?

Ans. Yes.

Ques. Did you go upon the premises with Sweeney and Armitage with a view to renting the premises?

Ans. I don't recollect.

Ques. Do you remember the year?

Ans. No.

Recross-ex.:

Ques. Did you nail it up as Ellen Sullivan's agent or to stop a nuisance?
Ans. To stop the nuisance.

John R. Watson was called & sworn and examined on the part of the plaintiff, and testified as follows:

I am acquainted with lot 8, block 30. I have been acquainted with it since 1864 or 1865, my place of business has been right opposite. I knew a Chinaman there. The sign Wau Lee was there. I was not acquainted with Wau Lee. I had possession of the 79 property as agent for Sweeney; that was in 1871, when Sweeney was East, from January to June. I collected for lot 8 from the occupants. They were Chinamen. I have seen it every day since 1865. In 1872 the Ch*a*na outfit left, and I don't know who was in possession. It has been vacant since the Chinamen left in 1871. I never knew there was any Wau Lee.

John M. Sweeney, recalled, testified:

I became agent for Ellen Sullivan and McCann some time in 1869, and continued until the 15th or 20th of January, 1874. The date in 1869 was the day of the conveyance of Lum Sing to Pat. McCann.

Plaintiff rests.

The defendant here moves for a nonsuit, and files his motion for that purpose in words & figures following, to wit:

Motion for Nonsuit.

80 (Title of Cause, Name of Court.)

And now comes the above-named defendant and moves for a nonsuit herein, and that the case be taken from the jury, for the following reasons:

1st. That the plaintiff has failed to prove by any legal evidence title to the premises in dispute.

2. That the plaintiff has failed to maintain her title to the premises in dispute by any competent proof or her right of possession thereto.

3. That the conveyances introduced by plaintiff in deraignment of her title fail to establish right or title to the premises in dispute, & therefore there can be no recovery in this action.

CHUMASERO & CHADWICK,
Def'ts' Attorneys.

Defendant moves to strike out all evidence as to deed from Wau Lee to Lum Sing, and retain other evidence given by plain- 81 tiff's witnesses, which said motion to strike out is in the words & figures following, to wit:

Motion to Strike Out.

(Title of Cause, Name of Court.)

And now comes the defendant and moves the court to strike out and exclude from the consideration of the jury the following evidence:

1. The evidence of Mr. Moe in reference to the evidence of entry of the town site.
2. The record of the patent.
3. The papers purporting to be a map of the town of Helena.
4. The paper purporting to be an application of Wau Lee to the probate judge to enter the lot in dispute.
5. The deed from Lum Sing to McCann.
6. The deed from probate judge to Wau Lee.
7. The evidence in reference to the alleged deed from Wau Lee to Lum Sing.
8. The evidence of Babcock in reference to the loss of the
82 deed from Wau Lee to Lum Sing, and the evidence of contents.

For the reasons:

1. That no foundation was laid for the introduction of the book of the Helena land office showing entries of town site, and that the evidence was incompetent.
2. That no foundation was laid for the introduction of the record of the patent.
3. That the paper purporting to be a map of the town of Helena does not show on its face that it was adopted by the proper authority as such map, and there was no evidence tending to show the same.
4. That the paper purporting to be the application of Wau Lee is not competent evidence, and that he was not a person authorized to make such application, and that it is void.
5. That the deed from Lum Sing to Wau Lee was not proper or competent evidence in the case.
83 6. That no foundation was laid for the introduction of parol evidence of the contents of the alleged deed from Wau Lee to Lum Sing, and that all of the above evidence was incompetent and was improperly admitted.

CHUMASERO & CHADWICK,
Def'ts' Attorneys.

Whereupon the court adjourned to March 30, 9 a. m.

MARCH 30—9 a. m.

The said motion of defendant for a nonsuit coming on to be heard, the same was overruled by the court. The motion to strike out all evidence of the deed from Wau Lee to Lum Sing coming on to be heard, the same was granted in part and in other parts denied by the court, reference being had to defendants' bill of exceptions No. 6, of which the following is a copy:

Def'ts' Bill of Exceptions No. 6.

(Title of Cause, Name of Court.)

Be it remembered that on the 29th day of March, A. D.
84 1880, that being one of the days of the March term, 1880, of
the said court, the defendant filed his motion to strike out and exclude from the consideration of the jury certain evidence which had been introduced by the plaintiff in this cause, which motion is as follows, to wit:

Motion to Strike Out.

And now comes the defendant and moves the court to strike out and exclude from the consideration of the jury the following evidence:

1. The evidence of Mr. Moe in reference to the evidence of entry of the town site.
2. The record of the patent.
3. The paper purporting to be a map of the town of Helena.
4. The paper purporting to be an application of Wau Lee to the probate judge to enter the lot in dispute.
5. The deed from Lum Sing to P. McCann.
6. The deed from the probate judge to Wau Lee.
7. The evidence in reference to the alleged deed from Wau Lee to Lum Sing.

85 8. The evidence of Babcock in reference to the loss of the deed from Wau Lee to Lum Sing, and the evidence of its contents.

For the reasons:

1. That no foundation was laid for the introduction of the book of the Helena land office showing entries of town site, and that the evidence was incompetent.
2. That no foundation was laid for the introduction of the record of the patent.
3. That the paper purporting to be a map of the town of Helena does not show on its face that it was adopted by the proper authority as such map, and there was no evidence tending to show the same.
4. That the paper purporting to be the application of Wau Lee is not competent evidence, and that he was not a person authorized to make such application, and that it is void.
5. That the deed from Lum Sing to Wau Lee was not proper or competent evidence in the case.

6. That no foundation was laid for the introduction of parol
86 evidence of the contents of the alleged deed from Wau Lee to
Lum Sing, and that all of the above evidence was incompetent and was improperly admitted.

CHUMASERO & CHADWICK,
Defend'ts' Att'ys.

Which said motion the said court overruled as to those portions thereof which are respectively numbered 1, 2, 3, 4, 5, 6. To which ruling and decision of the court the defendant then and there duly excepted, and asks the court to sign this bill of exceptions, and that the same be made a part of the record, which is done this 30th day of March, 1880.

D. S. WADE, *Judge.*

Defendants' Testimony.

Comes the defendant in this action and offers in evidence certain deeds, of which are the following, which said deeds are offered under objection of the plaintiff:

87 From N. Hilger, probate judge of Lewis & Clarke county, M. T., to Henry A. L. Tanner, conveying lot 8, block 30, in Helena town site, dated February 22, 1873. From Henry A. L. Tanner to Isaac J. Lewis, dated 27 February, 1873, conveying same property. From Isaac J. Lewis to Asenath Martin, dated 29 September, 1873, conveying same property. From Asenath Martin to Joshua Armitage, dated 29th January, 1875, conveying same property. From Joshua Armitage to E. M. Dunphy, dated 4 October, 1877, conveying same property. From Ellen Sullivan to E. M. Dunphy, dated 31 December, 1877, conveying lot 9, block 30.

Deeds. N. Hilger to Henry A. L. Tanner.

This indenture, made the 22nd day of February, in the year of our Lord one thousand eight hundred and seventy three, between N. Hilger, probate judge of Lewis & Clarke county, M. T., and Henry A. L. Tanner, of Jefferson county, Montana Territory, the party of the second part, witnesseth: That the said party of the first 88 part, for & in consideration of the sum of four dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents does remise, release, and forever quit-claim, unto the said party of the second part, and to his heirs and assigns, all that certain lot, piece, or parcel of land situate, lying, and being in the town of Helena, county of Lewis & Clarke, Territory of Montana, and bounded and particularly described as follows, to wit: Lot number eight (8), in block number thirty (30), being twenty-five (25) feet, more or less, front on Main street, and one hundred and twelve (112) feet deep, more or less, according to the map and plat thereof as is on file in the county recorder's office of said county. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and 89 profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever. This conveyance is made subject to the *bona fide* rights of miners possessed of mining ground within the limits above named on the twenty-sixth day of February, A. D. eighteen hundred and sixty-nine.

In witness whereof the said party of the first part has hereunto set his hand and seal, the day and year first above written.

[SEAL.] N. HILGER,
Probate Judge.

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

On this 22nd day of February, in the year of our Lord one 90 thousand eight hundred and seventy-three, before me, the undersigned, J. J. Williams, a notary public in and for said county, personally appeared the within-named N. Hilger, probate judge of said county, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the individual described in and who executed the said annexed instrument, and who duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

J. J. WILLIAMS,
Notary Public, Lewis & Clarke County, Montana Territory.

Deed. Henry A. L. Tanner to Isaac J. Lewis.

This indenture, made the 27th day of February, in the 91 year of our Lord one thousand eight hundred and seventy-three, between Henry A. L. Tanner, of Jefferson county, Montana Territory, party of the first part, and Isaac I. Lewis, of the aforesaid county and Territory, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar of lawful money of the United States of America, to me in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents do remise, release, and forever quit-claim, unto the said party of the second part and to his heirs and assigns all his right, title and interest in and to all that certain lot, piece, or parcel of land situate, lying, and being in the town of Helena, county of Lewis & Clarke, Territory of Montana, and bounded and described as follows, to wit: Lot No. (8) eight, in block thirty (30), being twenty-five (25) feet, more or less, front on Main street, and one hundred and twelve (112) feet deep, 92 more or less, according to the map or plat thereof as is on file in the county recorder's office of said county. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, in and to the aforesaid property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

HENRY A. L. TANNER. [SEAL.]

Signed, sealed, and delivered in the presence of—
HORACE C. LEWIS.

93 TERRITORY OF MONTANA, County of Lewis & Clarke, } *ss:*

On this 27th day of February, A. D. 1873, before me, Charles F. Ellis, county clerk in and for said county, personally appeared Henry A. L. Tanner, to me personally known to be the person described in and who executed the foregoing deed, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

Witness my hand and the seal of said county, the day and year last above written.

[SEAL.] CHARLES F. ELLIS,
County Clerk.

Deed. Isaac I. Lewis to Asenath Martin.

This indenture, made the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-three, between Isaac I. Lewis and Georgina Lewis, his wife, of Minneapolis, county of Hennepin and State of Minnesota, parties of the first part, and Asenath Martin, of Helena, Lewis and Clarke county, Montana Territory, the party of the second part, witnesseth: That said parties of the first part, for and in consideration of the sum of one dollar, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have remised, released, quit-claimed, and by these presents do remise, release, and forever quit-claim, unto the said party of the second part and to her heirs and assigns, forever, all that certain piece or parcel of land situated in the town of Helena, county of Lewis & Clarke, Territory of Montana, more particularly described as follows, to wit: Lot number (8) eight, in block number (30) thirty, being (25) twenty-five feet (more or less) front on Main street and (112) one hundred and twelve feet (more or less) deep. Said above-described property is numbered and described according to the plat of the official survey of the Helena town site by M. F. Truett, late probate judge of said Lewis and Clarke county. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and all the estate, right, title, and interest, either legal or equitable, of the said parties of the first part in the said premises, or any part thereof, or appurtenant thereto. To have and to hold the same, with all and singular the appurte- 94 95 nances thereto and improvements thereon, unto the said party of the second part, her heirs and assigns, forever.

In testimony whereof the parties of the first part have hereunto set their hands and seals at the date above written.

ISAAC I. LEWIS. [SEAL.]
GEORGIANA LEWIS. [SEAL.]

Sealed & delivered in presence of—
GEO. W. CHOWEN.
MARY A. LEWIS.

STATE OF MINNESOTA,
County of Hennepin, } *ss:*

Be it remembered that on the 29th day of September, in
96 the year of our Lord one thousand eight hundred and seventy-three, before me, a notary public in and for said county and State, appeared Isaac I. Lewis and Georgiana Lewis, to me known to be the same persons whose names are subscribed to the foregoing deed as grantors, and acknowledged the execution thereof to be their voluntary act and deed for the uses and purposes therein expressed. And the said Georgiana Lewis, having been by me examined separate and out of the hearing of her said husband, and the contents of the said instrument having been by me fully made known and explained to her, acknowledged that she executed the same freely, without fear or compulsion or under influence of her husband, and that she does not wish to retract the same.

Witness my hand & official seal.

[SEAL.] GEO. W. CHOWEN,
Notary Public, Hennepin County, Minn.

Deed. Asenath Martin to Joshua Armitage.

97 This indenture, made the twenty-ninth day of January, in the year of our Lord one thousand eight hundred and seventy-five, between Asenath Martin, of Helena city, county of Lewis & Clarke, Territory of Montana, party of the first part, and Joshua Armitage, of the same place, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States of America, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents does remise, release, and forever quit-claim, unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land situate, lying, and being in the town of Helena, county of Lewis & Clarke, Territory of Montana, and bounded and particularly described as follows, to wit: Lot number (8) eight, in block number (30) thirty, being (25) twenty-five
98 feet (more or less) front on Main street and (112) one hundred and twelve feet (more or less) deep. Said above-described property is numbered and described according to the plat of the

official survey of the Helena town site by M. F. Truett, late probate judge of said Lewis & Clarke county. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof and also all the estate, right, title, — interest to said property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first — of, in, or to the said premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set her hand and seal, the day and year first above written.

ASENATH MARTIN. [SEAL.]

99 Signed, sealed, & delivered in the presence of—
HENRY McMURPHY.

TERRITORY OF MONTANA,
County of Lewis & Clarke, } *ss:*

On this 30th day of January, A. D. one thousand eight hundred and seventy-five, personally appeared before me, T. H. Kleinschmidt, a notary public in and for the said Lewis & Clarke county and Territory of Montana, Asenath Martin, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, who acknowledged to me that she executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

100 In witness whereof I have hereunto set my hand and affixed my official seal the day & year in this certificate first above written.

[SEAL.] T. H. KLEINSCHMIDT,
Notary Public.

Deed. Joshua Armitage to E. M. Dunphy.

This indenture, made the fourth (4) day of October, in the year of our Lord one thousand eight hundred and seventy-seven, between Joshu Armitage and Martha N. Armitage, of Helena, Montana, party of the first part, and E. M. Dunphy, of the same place, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of two hundred and fifty dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents remise, release, and forever quit-claim unto the said party of the second part, and to his heirs and assigns, all that certain lot, piece, or parcel of land situate in the town of Helena, county of Lewis & Clarke, Territory of 101 Montana, and bounded and particulary described as follows, to wit:

Lot number eight (8), in block number thirty (30), being twenty-five (25) feet (more or less) front on Main street, in said town of Helena, and one hundred and twelve (112) feet (more or less) deep, according to the official map or plat of the said town of Helena on file in the office of the recorder of said county of Lewis & Clarke. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand & seal the day and year first above written.

JOSHUA ARMITAGE. [SEAL.]
MARTHA N. ARMITAGE. [SEAL.]

Sealed & delivered in the presence of—
R. H. WILLIAMS.

102 TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

On this fourth day of October, A. D. one thousand eight hundred and seventy-seven, personally appeared before me, I. B. Porter, a notary public in and for the said Lewis & Clarke county, Montana Territory, Joshua Armitage and Martha N. Armitage, his wife, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument as parties thereto, who each of them acknowledged to me that they, each of them, respectively, executed the same freely and voluntarily, and for the uses and purposes therein mentioned. And the said Martha N. Armitage, wife of the said Joshua Armitage, having been by me first made acquainted with the contents of said instrument, acknowledged to me, on examination apart from and without the hearing of her husband, that she executed the same freely
103 and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the county of Lewis & Clarke, the day and year in this certficate first above written.

[SEAL.] I. B. PORTER,
Notary Public.

Deed. Ellen Sullivan to E. M. Dunphy for Lot 9, Block 30. Executed 31 Dec., 1877.

This indenture, made the thirty-first day of December, in the year of our Lord one thousand *one thousand* eight hundred and seventy-seven, between Ellen Sullivan, widow, of the city of Champaign and county of Champaign, State of Illinois, of the first part, and E. M. Dunphy, of Helena, Lewis & Clarke county, Montana Territory, of

the second part, witnesseth: That the said party of the first
104 part, for and in consideration of the sum of fourteen hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said party of the second part, his heirs and assigns, all the following-described lot, piece, or parcel of land situated in the city of Helena, in the county of Lewis & Clarke, in the Territory of Montana, U. S. A., to wit: Lot number nine (9), in block number thirty (30), being thirty (30) feet front on Main street and one hundred and ten (110) feet deep; said lot being seventeen (17) feet wide on the rear or westerly end, and being situated on the west side of Main St., and bounded northerly by property [of] C. Armbrecket, easterly by Main St., southerly by property of Chinamen, and westerly by property of P. McKnight, all situate in the city of Helena, Montana Territory. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or in equity, of, in, and to the above-
104½ bargained premises, with the hereditaments and appurtenances. To have and to hold the said premises above bargained and described, with the appurtenances, unto the party of the second part, his heirs and assigns, forever. And the said Ellen Sullivan, party of the first part, hereby expressly waives, releases, and relinquishes unto the said party of the second part, his heirs, executors, administrators, and assigns, all right, title, claim, interest, and benefit whatever in and to the above-described premises, and each & every part thereof, which is given by or results from all laws pertaining to the exemption of homesteads. And the said Ellen Sullivan, party of the first part, for herself and her heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents she is well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeas*a*ble estate of inheritance in law, and in fee-simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and
104¾ other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatsoever kind or nature soever; and the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and ever defend.

In testimony whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

ELLEN SULLIVAN. [SEAL.]

Signed, sealed, and deliveaed in the presence of—

——— ———.

STATE OF ILLINOIS, } ss:
County of Champaign, }

Here follows acknowledgement in due form.

105 AH GAH, called, sworn, and examined on part of defendant, testified:

I came to Helena eleven or twelve years ago, in sixty something, sixty-eight I think. I came at same time Long Hing did. It was about 1867. I was here at the first big fire, and had been here a year and a half before that. I know where the Masonic Temple is. I knew a wash-house just below it. It was there when I came here. A company was in it called Wau Lee. Three Chinamen owned it. I don't know their names. Three men kept the Wau Lee wash-house. Wau Lee was the name of the wash-house. It was only Wau Lee wash-house. I did not know a Chinaman by the name of Wau Lee, only the wash-house. Never knew any Chinaman called Wau Lee, only the wash-house called Wau Lee.

Ques. What did Wau Lee wash-house mean?

Ans. All same as International Hotel. They wash clothes, and name was Wau Lee.

Ques. You never saw a man named Wau Lee?

106 Ans. No; I knew Wau Lee wash-house long time before big fire.

Ques. You knew no one by the name of Wau Lee?

Ans. No.

Cross-ex.:

Knew only Wau Lee Company; don't know names of all the Chinamen in the company. Wau Lee was the name of the house.

Redirect:

There was no man there by the name Wau Lee.

AH GON, called, sworn, and examined on the part of the defendant, testified:

I have been here since 1865. I know the wash-house (mentioned in former testimony.) Three men bought it. I remember the first big fire. It was April 29, 1869. The wash-house had then been there I can't tell how long. The house was called Wau Lee. Three men called by that name kept the house. The sign was Wau
107 Lee. Three men bought it, and the business was under the name Wau Lee. Wau Lee was the name of the wash-house; called them all Wau Lee, all same call Chinamen all Eh Wau who are in the Eh Wau store. I can't tell when they quit.

EH WAU, called, sworn, and examined on the part of the defendant, testified:

I have been here eleven years; I remember the big fire; I was here over a year before the big fire; I keep a store; I knew Wau Lee wash-house; I walk street and see sign "Wau Lee;" he had two or three partners; Wau Lee was the name of the wash-house; they buy goods from me, and say, "Charge to Wau Lee;" Wau Lee was the name of the house, and not of a man; it meant same as Eh Wau or Tong Hing, the name of a company; the Wau Lee was a company.

Cross-ex.:

Ques. Did you know the three men who did business as Wau Lee?
Ans. No.

108 Mau Taey, called, sworn, and examined on the part of the defendant, testified:

I have been here twelve years next August; I knew the Wau Lee house; I was here three years before I knew it; I remember the big fire; I knew the wash-house before the fire—the Wau Lee wash-house; the sign was Wau Lee; it was the name of a company, and not of a man; I knew Lum Sing; I never knew a man Wau Lee; I knew Lum Sing before the big fire; there was no Chinaman in the company by the name of Wau Lee; it was all same Eh Wau, a company name, and not a man's name; I was at the wash-house many times; I knew Lum Sing and the others, and there was none by the name of Wau Lee; it was just a company name; they sell out and house keep same name—just keep Wau Lee name all time.

Cross-ex.:

Ques. Where is Wau Lee?
109 Ans. He go to Missoula and then to China. Don't know and never did know the names of the three Chinamen.

Redirect:

Ques. Was it Wau Lee who went to Missoula?
Ans. No. It was Lum Sing who went to Missoula.

Joshua Armitage, called, sworn, and examined on the part of the defendant, testified as follows, to wit:

I know the premises lot 8, block 30; have known them since 1867. When I first knew it, it was only the locality. I remember the building on the premises since 1867. It was a small log house, 24 x 16 feet, and used as a China wash-house. In 1871 or early in 1872 was when it was last used as a wash-house. I knew the premises in 1873. The building was not then occupied. It was
110 then a cabin. I presume it was closed in, but don't know.
I knew Henry A. L. Tanner intimately. During the winter of 1873, in February, Tanner claimed the property. He occupied it, he told me.

Ques. Did Tanner assert a claim to this property in January or February, 1873?

Plaintiff objects. Objection overruled, and plaintiff excepts.

Ans. Yes, sir; in the latter part of February, 1873, perhaps about the 1st of March. After I received the deed from Martin, I took imme-

diate possession of the property, and saw to fastening it up. This was 29 January, 1875. When I took possession the building was broken down. I cleaned it out and locked it up. This was early in February, 1875. In March I employed a carpenter or two to repair it. The front was then leaning out. After repairing it I gave it into the hands of Hoyt as my agent. I gave him the keys and took him
111 through the house in the spring of 1875. Hoyt took care of it
until, I think, 1878, until I disposed of it to Dunphy. I had Hoyt deliver Dunphy the keys. The key remained with Hoyt until I sold to Dunphy. From the time I bought until I sold to Dunphy no one had possession except under me, except, in March, 1875, Ryan attempted to get possession as agent of McCann. No one else tried it. Ryan did not get any possession, nor did any one else. When I sold to Dunphy I delivered possession to him. From September, 1875, until I conveyed to Dunphy, I was in Helena, except a week I was in Butte. When I gave the key to Hoyt I was merchandizing in Helena, and was my own agent as to this building. I quit merchandizing June 1, 1875. From February, 1873, until I sold to Dunphy, to my knowledge, no one was in possession except Tanner
112 and myself.

Cross-ex.:

Ques. What did you pay Mrs. Martin?

Defendant objects. Sustained.

Ques. Where was Mrs. Martin living?
Ans. In Helena.
Ques. Did you negotiate with Mrs. Martin or with some one else?

Defendant objects. Objection overruled, and defendant excepts.

Ans. I conferred with Charles Cannon. Mrs. Martin herself gave me the deed. I commenced to repair the property in the latter part of March.
Ques. When you took the deed from Mrs. Martin did you not know that there was a title outstanding in the plaintiff?

Defendant objects. Question withdrawn.

Ques. Did Tanner live in Clancy?
Ans. Yes.
Ques. Was Tanner's assertion of title to this property his declarations to you?
Ans. Yes.

113 Plaintiff moves to strike out the evidence of this witness as to Tanner's assertion of ownership in the property in question.
Motion denied.

Ques. When did Tanner assert this ownership?
Ans. I don't remember exactly. It was when I returned from the States. I got back in the latter part of February, 1875.

Ques. When you took the deed from Mrs. Martin did you not know there was a title outstanding in the plaintiff?

Defendant objects. Objection overruled, and defendant excepts.

Ans. Yes, sir.

Ques. Had you ever negotiated with Ellen Sullivan or John Sweeney for the purchase of this property?

Ans. Yes. But I concluded that she had no title.

Ques. Was there a bargain made with Ellen Sullivan by you?

Defendant objects. Objection sustained.

Ques. Explain the improvements you made.

114 Ans. Early in the spring of 1875 I fastened the roof, repaired the sidewalk, locked up the house, cleaned it out, stored some boxes in it.

Ques. Was Hoyt your agent for any other property than this?

Ans. He had been for several other pieces of property.

Ques. Who put up the building?

Ans. I don't know.

Ques. Did you know of Sweeney claiming it?

Ans. Sweeney claimed to be the agent for the owner. I negotiated with Sweeney for lot 9 and for Mrs. Sullivan's interest in lot 8.

Ques. What negotiations did you have with Sweeney?

Defendant objects. Objection sustained.

Ques. Did Sweeney assume to have control of the premises?

Ans. Yes.

Ques. No one living on lot 8?

Ans. No one.

115 Ques. In 1876, did you do anything on this property?

Ans. I don't remember any special improvements; in 1876 I suggested to Hoyt to put down a sidewalk, which I think he did.

M. M. Holter, called, sworn, and examined on the part of the defendant, testified:

My business is lumber and hardware; I am acquainted with lot 8, block 30; I furnished the lumber for that building now on the lot; I furnished $1,336.00 worth of lumber; I am a building contractor, and know the value of improvements. In the building on those premises the carpenter's work is worth $130.00, the plastering and mason work is worth $150.000 or $200.00, painting is worth $30.00, and the stone wall $50.00 or $75.00.

E. M. Hoyt, called, sworn, and examined on the part of the defendant, testified:

I have known lot 8, block 30, since 1867; in 1875 I had
116 an office at lot 10, block 30. The premises, lot 8, block 30, ceased to be a wash-house about 1870 or 1871; I knew Henry A. L. Tanner; I know nothing personally of Tanner being in possession or asserting any claim to these premises.

Ques. Who was it in the possession a year previous to your taking possession?

Ans. I don't know the party; Armitage locked it up in 1875; I saw him with some one at work on it, putting on locks, &c. In 1876 I was agent for lot 9, but I had no key to the building on lot 8; after I was agent for Ellen Sullivan I never claimed any possession for her; Armitage was trying to lease it, and I looked it up, and saw that some trouble was brewing.

Ques. What is the market value of lot 8, block 30, and the improvements on it?

Plaintiff objects. Objection overruled, and plaintiff excepts.

Ans. My opinion is that the property would bring $3,000.00.

Ques. What is the value of the improvements alone?

117 Ans. I can't say without a computation.

Joseph Flick, being called and sworn, was examined on the part of the def't, & testified:

I have lived in Helena since 1865; I am acquainted with lot 8, block 30; I am a carpenter; I did some work in the spring of 1875 on the building for Armitage; I straightened the front and repaired the doors and locks; Mr. Armitage was in possession; I saw no one else around claiming the property; I can't say the month; it was between the first of March and the end of April.

Cross-ex.:

Armitage was with me when I made the repairs; either the door was open or Armitage opened it; I did less than a half day's work; I did not consider the building in first-class tenantable condition.

William A. Rumsey, called, sworn, & examined on the part of the defendant, testified:

118 I have lived in Helena since 1865; from 1865 or '66 to 1873 my place of business was on Broadway and Main streets; in 1866 I was where Kleinschmidt's liquor store now is; I built that building and did business there; I remember the wash-house on lot 8, block 30; I can't say that I saw Tanner at the wash-house in 1873; I have seen him there; I was once with him on the sidewalk in front of the cabin, and talked to him about the premises; he was the only man I talked to; the subject of the conversation was that I was trying to buy his interest in these premises; this was in the fall of 1873; the building was vacant and dilapidated.

A. B. Babcock, called, sworn, and examined on the part of the defendant, testified:

I knew Henry A. L. Tanner personally—first in the spring of 1867.

Ques. At any time in 1872 or 1873 did you see Tanner in possession of lot 8, block 30?

119 Ans. In 1873 or 1874 I saw Tanner on the front portion of this lot.

Ques. Was he in possession of the lot then?

Ans. He was there; merely came on sidewalk. I could not say that he came out of the log house. He came up from that lot. This was in the spring of 1873.

Ques. Did he at that or any other time assert a claim to the premises?

Ans. He said he owned the lot.

Ques. Did he assert a claim to this lot at that time?

Ans. He asserted his right.

Cross-ex.:

Ques. How late in the spring was this?

Ans. Some time in April.

Tax lists of E. M. Hoyt put in evidence here.

Defense rests.

Thereupon the court instructed the jury as follows, the same being embraced in defendants' bill of exceptions No. 8, which is as follows, to wit:

120 *Def'ts' Bill of Exceptions No. 8.*

(Title of Cause.)

Be it remembered that on the 31st day of March, after both parties had introduced their evidence and rested their cases, the court gave the jury instructions on part of plaintiff as follows, to wit:

Plaintiff's Instructions.

GENTLEMEN OF THE JURY:

The issues you are to try in this case, as formed by the pleadings therein, are as follows: The plaintiff, in her complaint, alleges that she is now, and ever since the second day of August, 1870, has been, the owner of and entitled to the possession of lot 8, in block 30, in the town site of Helena, Lewis & Clarke county. She also alleges that while she was so entitled to the possession of said premises the defendant, on the 4th day of October, 1879, without right or title, entered into and upon the same and ousted and ejected the 121 plaintiff therefrom, and ever since and now withholds the possession thereof from the plaintiff. The plaintiff also alleges that she and her grantors and predecessors in interest have been in the quiet, lawful, and exclusive possession of said premises since August, 1866, continuously up to and until the 4th day of October, 1877, and that the plaintiff was in the lawful, continuous, and exclusive possession of the said premises since the 2nd day of August, 1870, up to and until the 4th day of October, 1877.

The answer of the defendant Dunphy denies that the plaintiff is now, or that she ever was, the owner or entitled to the possession of the premises described in the complaint; denies the entry and ouster as in the complaint alleged, or that he wrongfully withholds the possession of the premises; denies that the plaintiff or her grantors or predecessors in interest were in the lawful possession of the said

lot or any part of the same at any time: avers that neither the plaintiff
-or her grantors or predecessors in interest, at any time,
122 had any right or title to the lot in question, but alleges that
the same was a vacant, unoccupied lot situate within the
town site of Helena, and that Henry A. L. Tanner, the grantor and
predecessor in interest of the defendant, in February, 1873, under
the laws of the United States and of this Territory, made an application
to the probate judge of Lewis & Clarke county and received a
deed for the premises, he being at the time the owner thereof, and
that since that date the defendant and his predecessors in interest
have been in the sole and exclusive possession of the premises, and
he placed valuable improvements thereon; that the defendant and
his predecessors in interest entered into the possession of the premises
under a claim of right, to wit, a deed from the probate judge, the
same being exclusive of any other right, and that he and his predecessors
in interest have been in the continued and uninterrupted
occupation and enjoyment of the premises from the last-named date
until the present time, and that from such date the same has
123 been held adversely to the plaintiff and all persons whomsoever
for a period of more than five years; wherefore it is
alleged that the plaintiff is barred from maintaining this action to
recover the possession of the said premises.

The plaintiff, replying to the affirmative allegations contained in
the answer of the defendant Dunphy, denies that the lot in controversy
was, at any time during the year 1873, a vacant or unoccupied
lot within the town site of Helena, but avers that the said lot was
duly deeded to the grantors and predecessors in interest of the plaintiff
by the probate judge of Lewis & Clarke county, under the laws
of the United States and of the Territory, on the 18th day of September,
1869, and that no person other than the plaintiff has had any
title to the lot since that date. Avers that the application of Tanner
to the probate judge subsequent to 1869 was without authority, and
at a time when the probate judge had no power, right, or authority
124 ity to execute a deed to the lot to any person, and subsequent
to a deed having been duly executed by the probate judge to
said premises, and therefore that the deed from the probate judge to
Tanner is null and void, and passed no title to the premises. Avers
that Tanner never had any possession of the premises, and never
had any interest therein. Denies that the defendant ever had any
predecessors in interest in the premises, or that they or he ever had
any possession of the premises prior to the 4th day of October, 1877.
Denies that the defendant entered and took possession of the premises
under a claim of right, and denies the adverse possession of the
defendant or his predecessors in interest for the period of five years.

From these issues it will be seen that each party claims title to
the property in question by virtue of conveyances from the probate
judge to their grantors and predecessors in interest, and each party
also claims title by virtue of adverse possession of the premises for
the statutory period. It is competent for either or both parties
125 to set up and to prove paper titles by conveyances, or to
allege and prove title by adverse possession, and whichever

party establishes by the evidence a valid paper title, or a valid title by adverse possession, should recover. Title by adverse possession of real estate is acquired by actual, continued, exclusive occupation and possession, under a claim of right or title, for the statutory period. Prior to Feb'y 17, 1877, such statutory period was three years; since that date the statutory period has been five years.

Given.

1. The paper title of the respective parties in this action *are* [is] based upon the entry of the original town site of Helena by one Myers F. Truett, at that time probate judge of Lewis and Clarke county, Montana Territory. You will, therefore, regard said entry as having been regularly and lawfully made from the date of the same, so as to invest in said Truett, as such probate judge, the legal title to the property thus entered for the several use and
126 benefit of the occupants thereof.

Given.

2. If you believe from the evidence that one Wau Lee was at the time of said entry an occupant of the property in controversy and continued in such occupancy, and that during such time the necessary notice and steps were taken and proper application and proofs for a deed were made, and that in pursuance thereof the said probate judge did make and execute to the said Wau Lee the deed introduced in evidence, then, for the purpose of this case, the said Wau Lee became invested with the legal title to said property, and the said probate judge became divested thereof, and any subsequent conveyance thereof by said probate judge conferred neither a legal or equitable title to the grantee. That is to say, if the probate judge has conveyed his title to said property to one, he cannot afterwards convey it to another.

Given.

127 3. It is of no consequence to the defendants in this case whether the conveyance to the said Wau Lee was made to him in his proper name, or what may have been his purpose or object in assuming it, and the record of such deed, which is properly executed and acknowledged, is notice to the world that said probate judge has parted with his title to said property, and that he has no authority to reconvey the same.

Given.

4. If the jury believe from the evidence that the probate judge had theretofore conveyed the property in controversy to a person, an occupant thereof, under and by the name of Wau Lee, and that in the year A. D. 1869 some one, claiming to be the owner thereof (whether such owner or not), conveyed the same to one Patrick McCann, and that he entered into the possession thereof under a claim of title thereto, and that said property was, at the time, a town lot with known and designated boundaries, according to the
128 plat and entry and conveyance of said probate judge as aforesaid; and you further believe that the said McCann conveyed the same to plaintiff, and that she likewise entered into the possession thereof, and that she and her grantor under their respective conveyances and under a claim of title respectively, and exclusive

of any other claim or right, occupied and possessed the property in the manner stated in the following instruction for the full space of three,years, then th*eir* title of plaintiff became as complete as if she had received the title regularly from said probate judge by his proper deed.

Given.

5. If plaintiff or her predecessors in interest purchased the property in controversy of some one, and received a deed therefor describing the same as it is described upon the town plat, survey, and entry, and a house and other improvements were at the time of said purchase upon a part of said lots, and she and her predeces-
129 sors in interest, or their servants or agents, received the key
to said house and took possession thereof, then such possession will be deemed possession of the whole of said lot, as well as notice of their claim to the same, and they will be deemed to be in the actual possession thereof until the same is adversely taken by another; and when such possession is taken and held under a claim of title exclusive of any other right for the full time of three years prior to February 17, 1877, it vests in such occupant a perfect title in all cases where the title to the property had prior to such occupancy passed from the probate judge.

Given.

7. If three years' adverse possession by defendant Dunphy and his predecessors in interest had not expired prior to the 17th day of February, 1877, then at least five years' adverse possession since the entry and before the commencement of this action was
130 necessary to divest the former owner of her title under the
statute of limitation of this Territory.

Given.

8. If the plaintiff or her attorney or agent employed Hoyt to take charge of the property in controversy, and he did so, and paid the taxes thereon, and that by reason thereof she regarded him as her agent and was authorized in so regarding him, and you find that during this condition of affairs the defendant Dunphy, or his predecessors in interest or agents or attorneys, likewise employed said Hoyt as their agent, and he acted in such double capacity, and that the principals were ignorant thereof, then his possession is not such unequivocal, exclusive, and actual, nor is it under such a claim of exclusive right, as would, during the continuance of such a state of affairs, authorize either plaintiff or defendant to invoke the operation of the statute of limitation against the other.

Given.

131 6. How did said plaintiff or her grantor continuously have
and hold adverse possession of said property, in person or through their servants or agents, for the period of three years before the entry of defendants or their or either of their predecessors in interest, and after the probate judge had conveyed the same to an occupant thereof? If you find that they did, you will then consider how long and up to what time did they so occupy it, and when, if at all, did defendant Dunphy or his predecessors in interest take averse possession of the same; and if you find that said Dunphy or his pre-

decessors in interest did take adverse possession according to the
rules given you, but that they did not hold such possession contin-
uously for three years from the date thereof to the 17th day of Feb-
ruary, A. D. 1877, then, in order to make such adverse possession
available, it must have been continuously by said Dunphy,
132 his servants or agents, for the space of five years before the
commencement of this action.

Given.

9. If you find from the evidence that plaintiff and her grantor was in the adverse possession of the property in controversy, and that they, or their servants or agents, had the key to the house thereon, and you further find that while such was the case defendant Dunphy, or his predecessors in interest, without the knowledge of plaintiff or her agent, took the lock from the door of said house and replaced it with another, or in some way procured a key to the lock thereon, then the possession thus acquired and held, in the absence of an actual or open occupation of the same in such way that would give notice thereof, will not constitute an adverse possession until plaintiff, or her agent or servant, received notice thereof.

Given.

133 10. If Hoyt was the agent of plaintiff with respect to such
property, and was paying the taxes thereon for her, he could
not, during the continuance of such agency and without notice to
her, or her servant or agent, occupy the same adversely to her,
either for himself or another, and if he did so you will eliminate
such time from the occupancy of said property, and plaintiff had
prior thereto occupied said property adversely for three years; and
defendant, without including said time, had not divested her of said
title, you will find for the plaintiff, in so far as the respective rights
of the parties are concerned, under the statute of limitation.

11. If the jury believe from the evidence that the plaintiff, or
her predecessors in interest, entered into the actual prior posses-
sion of the property in controversy under the deed from
Lum Sing to Patrick McCann, in September, A. D.
134 1869, such possession is presumed to continue against the
defendant Dunphy and his predecessors in interest, whether
actually occupied in person or by a tenant, until said defendant
Dunphy or his predecessors in interest take an actual adverse pos-
session of the same and oust said plaintiff therefrom; and if the
deeds from the probate judge to the said plaintiff or her predecessors
in interest, or the defendant or his predecessors in interest, are void,
then the possession of the defendant and his predecessors in interest,
in order to set in motion the statute of limitation, must take such
an open, notorious, actual, and exclusive possession of said property
under a claim of title as would give reasonable notice of such claim,
and maintain such open, notorious, and exclusive possession for the
space of three full years next preceding the 17th day of Feb-
135 ruary, 1877; and if they had not so occupied the same for said
period of time up to said date, then such occupancy must
have been for the time of at least five years continuously before the

— day of ——, A. D. 1879, being the date of the commencement of this action.

Given.

12th instruction refused.

13. If it is not disputed that the application to the probate judge was made by a person representing himself to be Wau Lee, and that he signed his name as such, and that the deed for the property in controversy was executed to him under and by the name of Wau Lee, the presumption of law would be that said Wau Lee was a natural person, and that such was his real and proper name, and this
presumption continues until it is shown by competent evi-
136 dence that such was not in fact his name or that there was no
such person.

14. The jury are instructed that in determining the claims of the respective parties to the possession of the property in controversy they may take into consideration who, if any one, was exercising a supervisory control of the property in controversy, renting or attempting to rent the same, collecting the rents therefor, if any were collected, as well as the listing of said property for assessment, if the same was done, and the payment of any taxes on the same, if any were paid, and when and by whom the same was done.

Given.

15. (Erased.)

16. If plaintiff and her predecessors in interest were in the prior possession of the property in question, and continued so up to the
date of the adverse possession of the defendant or their pre-
137 decessors in interest, if they had any, it devolves upon them
to show by a preponderance of evidence that they held the adverse possession, acquired as heretofore given you, and that if they held a possession in a secret and disguised way, so as not to impart notice of the change of such possession, and plaintiff and her lawful agent (not acting in collusion with defendant or his predecessors in interest) had no actual notice of such disguised possession and claim of title, such possession is not adverse, and no claim can be asserted on account thereof.

17. In considering the question of improvements made upon the property by defendant Dunphy it can neither add to -or diminish any title he may have had; but in order to set off the same against
the damages of fifty dollars a year admitted by the pleadings,
138 in the event you find for the plaintiff he must show that the
same was made under color of title and in good faith. That is to say, it must not only be under color of title, but under such circumstances as would justify an honest man with the knowledge he possessed of the claim of plaintiff in making the same. It is not every person who obtains possession of property and improves it that can set off the same against damages for the detention thereof. He may have notice of the claim of another; and in such case, if he makes improvements, he must abide the final result of such claim. He could at any time, if in possession, bring an action to quiet the title to the property, and would be under obligation equally as imperative to do so as such claimant would be if demanded to bring

an action of ejectment, should such demand be made of her in person or her agent at the time.

18. The direct evidence of one witness who is entitled to
139 full credit is sufficient for proof of any fact except perjury
and treason.

19. A witness is presumed to speak the truth. This presumption may, however, be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

The defendant at the time of giving said instructions duly excepted to the giving of the first instruction asked for by plaintiff on the ground that the same — not applicable to the case, and tended to mislead the jury, and that the same was not law.

The defendant also duly excepted at the time to the giving of plaintiff's 2nd instruction for the reason above given.

The defendant also duly excepted at the time to the giving of
plaintiff's 3rd instruction for the reason above assigned.

140 The defendant also, at the time they were severally given,
duly excepted to each one of the several instructions asked
for by plaintiff, and which are numbered 4, 5, 6, 7, 8, 7, 8, 9, 10, 11, & 13, for the reason that each one of the said instructions was inapplicable under the evidence given in the case; that it was not law, and that it had a tendency to mislead the jury; and for the above-recited reasons the defendant duly, at the time, excepted to the giving of each one severally of the instructions asked for by plaintiff, and which are numbered 14, 15, 16, 17, 18, and 19.

The defendant asked the following instructions, viz:

Defendants' Instructions.

1. The court instructs the jury that if the plaintiff recovers at
all in this action it must be upon the strength of her own title, and
not upon the weakness of defendant's title; that is to say, that
plaintiff claims the property in dispute as the owner thereof
141 and the right of possession. The defendant denies that the
plaintiff is the owner of the said lot 8, in block 30, or that she
is entitled to the possession of the same, and the defendant is in the possession thereof. Therefore it devolves upon the plaintiff to prove by a preponderance of evidence that she was the owner of said lot and entitled to the possession thereof; and if she has failed so to do, then the jury must find for the defendant.

Given.

2. A party being in the possession of real estate like lot No. 8,
every presumption of law is to the effect that he is the owner thereof,
unless such party claims under another by way of a lease or something of that character; and, if so, a party institute an action against the person in possession, unless he establishes his title to said property or right of possession by clear and preponderating evidence, he
must fail in his action. It is not sufficient that the jury be
142 satisfied that the plaintiff's title is stronger or better than

that of the defendant, but they must be satisfied from the evidence of the facts above stated; that is, that he is the owner of or entitled to the possession of the lot in dispute.

Given.

3. If the jury believe from the evidence that the name "Wau Lee" was one adopted or assumed to represent a company, or a number of Chinamen associated together, or the name of a wash-house, and was not the name of a person, then the application introduced in evidence by plaintiff to obtain title to the said lot 8 and the deed from the probate judge to "Wau Lee" therefor should be disregarded by the jury. The applicant for the entry of such town lots in the Helena town site must, under the requirements of the statute relative thereto, have been made by some person then living and capable of taking the title, and the deed, in pursuance of such application, given to some person, and not a wash-house, by some name assumed therefor.

Given.

143 4. If the jury find from the evidence that no such person as "Wau Lee" was in existence, and that this name was adopted by several Chinamen as a business name or style, then the deed from the probate judge to such firm or association name would be void, and, if void, then the lot was subject to location and entry, the same as if the first deed had not been granted; that is to say, a conveyance to an inanimate object or to a fictitious person not in being would be void and convey no title.

Given.

5. If the jury should find from the evidence that a valid deed had been made by the probate judge to "Wau Lee," and that the plaintiff has failed to prove that she ever acquired such title, then she can take nothing or gain anything by or under said deed; but such deed might give color of title for the purposes of adverse possession.

Given.

6. The jury is instructed that the plaintiff, having failed to
144 prove that any deed from "Wau Lee" to "Lum Sing," the
plaintiff in this action can claim nothing by the deed from the probate judge to "Wau Lee," and she is left without any paper title connecting her with the United States through the probate judge aforesaid; but the conveyance to Lum Sing, to McCann, and from McCann to plaintiff would be sufficient to give color of title for the purposes of claiming the property by adverse possession.

Given.

7. If the jury believe from the evidence that under the instructions above given *that* no title passed from the probate judge, under or by the deed to "Wau Lee," then the said Henry A. L. Tanner had the legal right and acquired the title to the said lot, providing he complied with the statutes of the United States and the Legislative Assembly of Montana; and that if, [in] compliance with the said laws, he obtained such title, and that the same was conveyed to the
defendant, and that he was in possession of said lot at the
145 time of the institution of this suit, then the jury will find for
the defendant.

Given.

8. The issues in this case are raised and settled between the parties by the answer and replication and the statute of the Territory; and the plaintiff, in her replication, having set up that she was the owner of the said lot in fee, and under the said deed from the probate judge, therefore the plaintiff is required to prove her title as set forth in the replication, and if she has failed so to do then the jury will find for the defendant.

Refused.

9. If the jury find from the evidence that, since the spring of 1874, the defendant, and those conveying to him, have had the actual adverse possession of the said premises, and that the plaintiff, or her predecessors in interest, has not had the actual possession thereof since that date, then the jury should find for the defendant. Although the fact may be conceded that the plaintiff may have had
an agent in Helena to look after the said property or said lot,
146 in connection with another lot; and, further, that she may
have paid taxes thereon, this would not be actual possession,
or such a possession as would entitle her to recover.

Given.

9. The complaint in this cause sets up title in the plaintiff to the property in controversy, and alleges an ouster by the defendant. The answer of the defendant denies the title of plaintiff to the property, and sets up title in himself under conveyances made by the probate judge of Lewis & Clarke county to one H. A. L. Tanner, upon his application for deed to the premises under the laws of the United States and of this Territory, and from said Tanner to the defendant. To this answer the plaintiff filed a replication, which does not deny that such application was made, nor does it deny the execution of the deed from the probate judge to Tanner. Those facts, therefore, stood admitted, and the jury are instructed that there is no controversy between the parties on the question as to the
making of the application for title to the probate judge by
147 Tanner and the execution of the deed from the probate judge
to Tanner.

Given.

10. The jury are further instructed that, if they believe from the evidence that the paper purporting to be a deed from the probate judge to "Wau Lee" was ever executed, and that there was not any such individual as "Wau Lee," but that the name "Wau Lee" was merely assumed and used by several Chinamen as partners, as a sign or business designation, then the conveyance by the probate judge was a mere nullity, and the actual title to said premises still remained as if it had never been conveyed, and was subject to sale and disposition by the probate judge as fully as if no deed had ever been executed. Even if an application was made to the *to the* probate judge for title to the lot in controversy in the name of "Wau Lee," and the jury believe from the evidence that no such individual as "Wau Lee" was in existence; and that the applica-
tion was not made for the benefit of or by an occupant,
148 such application was void; and if the jury further be-
lieve from the evidence that the name "Wau Lee" was

only a business designation of several Chinamen, neither of whom bore that name, but who used that name as a sign, under which they transacted business, and that one of those Chinamen swore to the said application under the assumed name of "Wau Lee" as an individual, and that such application was not made for the benefit of any individual occupant, such application was and is absolutely void, and of no effect for any purpose, and any deed executed by the probate judge based on such application would be void, and no title of any kind whatever would pass thereunder to any person; and the jury are instructed, if they believe from the evidence that such application and deed were made and executed under such circumstances, that they will entirely disregard the same.

(Modified as follows): "But if the application to the probate judge was made by an actual person, the occupant of the lot, and
149 for himself, it is not material whether he made the application in his own or some other name. The real question is, was the application made by the actual occupant of the lot for his own benefit, and was the probate judge's deed made to such occupant."

Given.

11. The jury are further instructed that, if they believe from the evidence that the plaintiff, and her predecessors and grantors, ever were in possession of the premises in dispute, claiming under alleged conveyances which were illegally or fraudulently obtained, and under which the title to the property in dispute had not passed, but remained in the probate judge until the 22nd day of February, 1873, the time of the date of the conveyance of the property to Tanner, then no possession of the premises by the plaintiff or her grantors prior to that date can be considered by the jury; the title to said premises, if the conveyance to Wau Lee was void, still remaining in the probate judge until the conveyance to Tanner; and there could not be any adverse possession of the property as
150 against the probate judge.

Given.

12. If the title remained in the probate judge until his conveyance to Tanner, and the plaintiff claims title to the premises in dispute by an alleged adverse possession, such claim could only date from the time of the conveyance to the grantors of the defendant, and before the jury would be justified in finding a verdict for the plaintiff they must believe from the evidence that the plaintiff and her grantors have had the actual, exclusive, and open possession of the premises from such date, and that such possession was and had been continuous for the full period of three years prior to the 17th day of February, 1877, and any break in such possession and occupation and possession by others during such period of three years would defeat the operation of the statute.

Given.

13. If the jury believe from the admissions in the pleadings and the evidence that Henry A. L. Tanner was in possession of
151 the premises in dispute at and before the time of the date of

the deed from the probate judge to him, and that neither the plaintiff or her grantors, or both, have since that date, viz, February 22, 1873, been in the continuous and actual occupancy of the lot in dispute for the period of three years without break of time during such period, they must find for the defendant.

Given.

16. The mere employment of an agent, the listing of the property with the assessor for taxation or the actual payment of taxes, does not constitute possession of property of such a character as would under the law relative to adverse possession constitute a claim of title to real property. But the acts in connection with taking the key of the building and going into possession and exercising acts of ownership would be sufficient to constitute adverse possession. Nothing but an actual, visible, notorious occupancy of the lot itself would constitute such claim.

Given.

152 17. The plaintiff must recover, if at all, upon the strength of her own case, and not on the weakness or assumed weakness of the defendant, and unless the jury believe from the evidence that she has the actual legal title to the premises in controversy, the jury must find for the defendant.

The court refused to give the instruction numbered "8."

To which refusal the defendant then and there duly excepted.

The defendant also excepted to the modification of his 11th instruction by the court inserting therein after the word "existence" the words "and that the application was not made for the benefit of an occupant," and by inserting after [the] word "individual" the words "and that such application was not made for the benefit of any individual occupant." And also by adding at the end thereof: "But if the application to the probate judge was made by an actual person, the occupant of the lot, and for himself, it is not ma-
153 teriol whether he made the application in his own or some
other name. The real question is was the application made by the actual occupant of the lot for his own benefit, and was the probate judge's deed made to such occupant," for reasons above assigned.

The defendant also at the time duly excepted to the modification of his 13th instruction by the court by striking out the first word thereof ("if") and inserting before the word "the" as follows: "If the title remained in the probate judge until his conveyance to Tanner and," and by inserting after the words "three years" the words "prior to the 17th Feb'y, 1877," for the same reasons above assigned.

The defendant also at the time duly excepted to the refusal of the court to give defendant's 15th instruction, which is in the words following, viz: "If the jury believe from the evidence that the defendant's grantors were in possession of said premises in 1873, and that they or some of them — also in possession of the said premises during the years 1875 & 6, and that the defendant in this
154 case was in the actual possession of said premises since the
fall of 1877, and has continuously remained in possession and

placed valuable improvements on the same, then the plaintiff cannot recover on the ground of her possession, if any, or claim of possession, of the premises at any interval or intervals during the periods aforesaid."

The defendant also at the time duly excepted to the modification by the court of his 16th instruction by adding thereto, after the word "property" the words "but these acts, in connection with taking the key of the building and going into possession and exercising acts of ownership, would be sufficient to constitute adverse possession." For the reason that the said modification renders said instruction contradictory, misleading, and is not the law, and that it assumes facts to have been proven on which to base a verdict, and asks the court to sign this bill of exceptions, which is done.

D. S. WADE, *Judge.*

155 The jury returned a verdict for the plaintiff in the words following, to wit:

Verdict.

(Title of Cause.)

"We, the jury in the above-entitled cause, find for the plaintiff.

"D. T. GOODELL, *Foreman.*"

And also returned into court the following special findings, to wit:

Special Findings.

(Title of Cause.)

1. Was there such a person as Wau Lee, and did he procure a deed from M. F. Truett, probate judge of Lewis & Clarke county, Montana Territory, to lot No. 8, in block No. 30, in the town of Helena, Lewis & Clarke county, Montana Territory, on the 18th day of September, A. D. 1869?

Yes.

D. T. GOODELL, *Foreman.*

2. Did one Lum Sing convey the same property, by deed dated September 30, 1869, to Patrick McCann?

Yes.

D. T. GOODELL, *Foreman.*

156 3. Did Patrick McCann, at said date of September 30, 1869, enter into the actual possession of said premises under said deed, through himself, tenant, or agent?

Yes.

D. T. GOODELL, *Foreman.*

4. Did Patrick McCann, by himself or through his tenant or agent, continue in the possession of said premises until August 2, 1870?

Yes.

D. T. GOODELL, *Foreman.*

5. Did Patrick McCann, on the 2nd day of August, A. D. 1870, convey the said premises by deed to Ellen Sullivan, the plaintiff in this action?

Yes.

D. T. GOODELL, *Foreman.*

6. Did Ellen Sullivan, the plaintiff in this action, through her tenant or agent, at said date of August 2, 1870, enter into the actual occupancy of said premises under said deed?

Yes.

D. T. GOODELL, *Foreman.*

7. If to the 7th special issue your answer be yes, you will state
how long and to what date Ellen Sullivan, through her ten-
157 ants and agents, continued in the actual occupation of said
premises.

From August 2, 1870, to Oct. 4, 1877, inclusive.

D. T. GOODELL, *Foreman.*

8. Did any one, save and except the defendant, Dunphy, enter into the actual, open, notorious, and exclusive possession of said premises adversely to the plaintiff prior to the month of October, A. D. 1877?

No.

D. T. GOODELL, *Foreman.*

9. Was the deed from the probate judge to Wau Lee and the deed from Lum Sing to Patrick McCann recorded in the recorder's office of Lewis & Clark county on the 7th day of June, A. D. 1870?

Yes.

D. T. GOODELL, *Foreman.*

10. Was the deed from Patrick McCann to plaintiff recorded in the county recorder's office on the 17th day of August, A. D. 1870?

Yes.

D. T. GOODELL, *Foreman.*

158 The evidence shows that Dunphy put certain improvements upon said premises in controversy.

11. Did said Dunphy put said improvements on said premises after having actual & constructive notice of the plaintiff's claim?

Yes.

D. T. GOODELL, *Foreman.*

12. Did he put said improvements on said premises under color of title & in good faith?

No.

D. T. GOODELL, *Foreman.*

13. Was J. J. Lewis or Asenath Martin or any one representing them or either of them in the open, notorious, exclusive, and continuous possession of the premises in controversy?

No.

D. T. GOODELL, *Foreman.*

14. Was there a Chinaman by the name of "Wau Lee," who made application for entry under townsite act for lot 8, in block 30, and who received the deed from the probate judge of said county?

Ans. Yes.

D. T. GOODELL, *Foreman.*

159 15. Did the name Wau Lee represent a person, or was it the name of the wash-house or the name of a company?

Answer. A person.

D. T. GOODELL, *Foreman.*

16. Was Henry A. L. Tanner in the possession of the said lot 8 in block 30, at the time he received from the probate judge of said county a deed for said lot?

Answer. No.

D. T. GOODELL, *Foreman.*

17. What is the value of the improvements placed upon the said lot & the lot together with improvements?

Answer. Improvements, $1,800.00

Lot & improvements, $3,000.

D. T. GOODELL, *Foreman.*

18. Who was in the possession of the said lot from March, 1874, to March, 1879?

Answer. Plaintiff from March, 1874, to Oct. 4, 1877, defendant from Oct. 4, 1877, to March, 1879.

D. T. GOODELL, *Foreman.*

160 Whereupon the following judgment was entered in favor of the plaintiff and against the defendant, to wit:

Judgment.

(Title of Cause.)

This 27th day of March, A. D. 1880, this action came on regularly for trial; the said parties appeared by their attorneys; a jury of twelve persons were regularly empanneled and sworn to try said action; witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names, and say they find a verdict for the plaintiff; and at the same time return their special verdict, which is in words and figures as follows, to wit:

Special Issues Submitted by Plaintiff.

(Title of Cause, Name of Court.)

161 1. Was there such a person as Wau Lee, and did he procure a deed from M. F. Truett, probate judge of Lewis and Clarke county, Montana Territory, to lot No. 8, in block No. 30, in

the town of Helena, Lewis & Clarke county, Montana Territory, on the 18th day of September, A. D. 1869?

Yes.

D. T. GOODELL, *Foreman.*

2. Did Lum Sing convey the same property by deed dated September 30, 1869, to Patrick McCann?

Yes.

D. T. GOODELL, *Foreman.*

3. Did Patrick McCann, at said date of September 30, A. D. 1869, enter into the actual possession of said premises under said deed through himself, tenant, or agent?

Yes.

D. T. GOODELL, *Foreman.*

4. Did Patrick McCann, by himself or through his tenant or agent, continue in the possession of said premises until August 2, 1870?

Yes.

D. T. GOODELL, *Foreman.*

162 5. Did Patrick McCann, on the 2nd day of August, A. D. 1870, convey the said premises by deed to Ellen Sullivan, the plaintiff in this action?

Yes.

D. T. GOODELL, *Foreman.*

6. Did Ellen Sullivan, the plaintiff in this action, through her tenant or agent, at said date of August 2, 1870, enter into the actual occupancy of said premises under said deed?

Yes.

D. T. GOODELL, *Foreman.*

7. If to the 6th special issue your answer be yes, you will state how long and to what date Ellen Sullivan, through her tenant and agents, continued in the actual occupation of said premises?

Ans. From August 2, 1870, to Oct. 4, 1877, inclusive.

Yes.

D. T. GOODELL, *Foreman.*

8. Did any one, save & except the defendant Dunphy, enter into the actual, open, notorious, and exclusive possession of said premises adversely to the plaintiff prior to the month of October, A. D. 1877?

No.

D. T. GOODELL, *Foreman.*

163 9. Was the deed from the probate judge to Wau Lee and the deed from Lum Sing to Patrick McCann recorded in the recorder's office of Lewis & Clarke county on the 7th day of June, A. D. 1870?

Yes.

D. T. GOODELL, *Foreman.*

10. Was the deed from Patrick McCann to plaintiff recorded in the county recorder's office on the 13th day of August, A. D. 1870?
Yes.

D. T. GOODELL, *Foreman.*

The evidence shows that Dunphy put certain improvements upon said premises in controversy.

11. Did said Dunphy put said improvements on said premises after having constructive and actual notice of the plaintiff's claim?
Yes.

D. T. GOODELL, *Foreman.*

12. Did he put said improvements on said premises under color of title and in good faith?
No.

D. T. GOODELL, *Foreman.*

164 13. Was J. J. Lewis or Asaneth Martin, or any one representing them or either of them, in the open, notorious, exclusive, and continuous possession of the premises in controversy?
No.

D. T. GOODELL, *Foreman.*

14. Was there a Chinaman by the name of Wau Lee, who made application for entry under townsite act for lot 8, in block 30, and who received the deed from the probate judge of said county?
Answer. Yes.

D. T. GOODELL, *Foreman.*

15. Did the name Wau Lee represent a person, or was it the name of the wash-house, or the name of a company?
Ans. A person.

D. T. GOODELL, *Foreman.*

16. Was Henry A. L. Tanner in the possession of the said lot No. 8, in block 30, at the time he received from the probate judge of said county a deed for said lot?
Ans. No.

D. T. GOODELL, *Foreman.*

17. What is the value of the improvements placed upon the said lot, and the lot together with improvements?
165 Ans. Improvements, $1,800.00; lot and improvements, $3,000.00.

D. T. GOODELL, *Foreman.*

18. Who was in the possession of the said lot from March, 1874, to March, 1879?
Answer. Plaintiff from March 4, 1874, to Oct. 4, 1877. Defendant from Oct. 4, 1877, to March, 1879.

D. T. GOODELL, *Foreman.*

Therefore, it is adjudged that the plaintiff, Ellen Sullivan, recover of the defendants, Elijah M. Dunphy and Thomas H. White, the

possession of the real property described in the complaint, to wit: Lot number eight, in block number thirty, in the town of Helena, Lewis & Clark county, Montana Territory. And further that she recover from the said defendant, Elijah M. Dunphy, the sum of —— dollars for the rents and profits of said premises as admitted by the pleading, and the further sum of $\$128\frac{65}{100}$ dollars, plaintiff's
166 costs and disbursements herein.

Dated April 2, 1880.

D. S. WADE, *Judge.*

And on the 10th day of April, 1880, the defendant filed and served on the plaintiff his notice of intention to move for a new trial herein, which said notice is as follows, to wit:

Notice of Motion.

(Title of Cause.)

The defendant, E. M. Dunphy, hereby gives notice of his intention to move for a new trial in the above-entitled action upon the following grounds:

1. Irregularity in the proceedings of the adverse party in reading to the jury and commenting upon a certain deed which had not been introduced in evidence by which the defendant was prevented from having a fair trial.

2. Insufficiency of the evidence to justify the verdict.

3. That the verdict was against law.

167 4. Error in law occur-ing at the trial and accepted to by the defendant as shown by bills of exception on file herein.

5. And that said motion will be made upon affidavits, bills of exception, numbered 1, 2, 3, 4, 5, 6, 7, & 8, upon the minutes of the court, and upon a statement of the case.

CHUMASERO & CHADWICK,
Def't's Att'ys.

And upon the motion for new trial herein the defendant assigns the following errors, upon which said motion will be based:

1. Errors of law occurring at the trial and excepted to by the defendant, viz:

a. The court erred in permitting to be introduced and read in evidence the abstract book of the Helena land office. See bill of exceptions No. 1.

b. The court erred in permitting the record of the patent to the Helena townsite to be read in evidence, no foundation having been laid therefor. (See bill of except's No. 2.)

168 *c.* The court erred in permitting the paper purporting to be a map of the Helena townsite to be introduced in evidence. (See bill of exceptions No. 3.)

d. The court erred in permitting the paper purporting to be an application to the probate judge of Wau Lee to enter the lot in dispute, to be given in evidence. (See bill of exceptions No. 4.)

e. The court erred in permitting the paper purporting to be a deed from the probate judge to Wau Lee to be given in evidence. (See bill of exceptions No. 3.)

f. The court erred in permitting the paper purporting to be a deed from Lum Sing to P. McCann in evidence. (See bill of exceptions No. 4.)

g. The court erred in permitting the following questions to be asked of witness P. McCann, and answered by him:

1. When you bought this property who was in possession of the property?

2. How long had he been in possession?

169 3. What deeds had you to the lot? (See bill of exceptions No. 4.)

h. The court erred in permitting evidence of the contents of the supposed deed from Wau Lee to Lum Sing. (See bill of exceptions No. 4 and also evidence of McCann, pages — of statement.)

i. The court erred in refusing to strike out the evidence of the contents of said paper on defendant's motion. (See bill of except's No. 4.)

The court erred in permitting the following questions to be asked of the witness, A. B. Babcock, and answered by him. The witness having testified that certain deeds were brought to him by Lum Sing, was asked—

1. State whether or not there was among these deeds a deed from Wau Lee to Lum Sing.

2. What was the purport of the deed or bill of sale from Wau Lee to Lum Sing? (See bill of exceptions No. 5.)

j. The court erred in permitting to be asked of S. C. Ashby, to be answered by him, the following questions:

1. Who was the agent of this property in 1873?

170 2. Who gave in the lot for assessment? (See bill of exceptions No. 5.)

The court erred in overruling the defendant's motion to strike out the evidence of Mr. Moe in reference to the Helena townsite.

2. The copy of the patent.

3. The paper purporting to be a map of the Helena townsite.

4. The paper purporting to be an application of Wau Lee to the probate judge.

5. The deed from Lum Sing to P. McCann.

6. The deed from the probate judge to Wau Lee.

7. The evidence in reference to the alleged deed of Wau Lee to Lum Sing.

8. The evidence of Babcock in reference to the loss of the deed from Wau Lee to Lum Sing and the evidence in regard to its contents. (See motion and bill of exceptions No. 6.)

k. The court erred in overruling defendant's motion for non-suit. (See motion & bill of exceptions No. 7.)

171 *l.* The court erred in giving to the jury the following instructions asked for by plaintiff, and to the giving of each of which severally and separately, the defendant at the time duly excepted, viz., instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, &

13, 14, 15, 16, 17, 18, and 19, for reasons set forth in the bill of exceptions in this cause, and which is numbered 8, and a copy of which is heretofore herein inserted.

m. The court erred in refusing to give defendant's instruction numbered 8.

2. The court erred in modifying the defendant's 11th instruction. See bill of except's No. 8.

3. The court erred in modifying the defendant's 13th instruction.

4. The court erred in refusing to give the defendant's 15th instruction. (See bill of exceptions No. 8.)

7. The court erred in modifying defendant's 16th instruction.

CHUMASERO & CHADWICK,
Att'ys for Defendants.

172 *Notice & Motion.*

(Title of Cause)

You will take notice that on the first day of the next term of the court, or as soon thereafter as counsel can be heard, the defendant in the above-entitled cause will move the court to grant a new trial in the above-entitled cause upon the grounds stated in notice of motion and statement herewith filed.

CHUMASERO & CHADWICK,
Def't's Attorneys.

The foregoing statement with the amendments allowed and hereto attached is correct.

May 23, 1881.

D. S. WADE, *Judge.*

And on the — day of May, A. D. 1881, that being one of the term days of the May term, 1881, of said district court, defendant's said motion for new trial herein, coming on to be heard, the court overruled the same, to which ruling of the court the defendant then and there duly excepted.

173 And on the 16th day of June, A. D. 1881, the said defendant, Elijah M. Dunphy, filed herein his notice of appeal, in words & figures following, to wit:

Notice of Appeal.

(Title of Cause.)

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this Territory from the order of the court overruling defendant's motion for new trial and from the judgment therein made and entered in the said district court on the 2nd day of April, A. D. 1880, in favor of the plaintiff in said action and against said defendaint and from the whole thereof.

Dated this 14th day of June, 1881.

Yours, &c.,

CHUMASERO & CHADWICK,
Att'ys for Defendant.

To the clerk of said district court & Shober & Lowry & Toole & Toole, att'ys for plaintiff.

174 The service and receipt of a copy thereof admitted after filing, this 16th day of June, 1881.

E. W. TOOLE,
Attorney for Appellee.

And on the same day, viz., June 16, 1881, said defendant filed herein his undertaking on appeal, which is as follows, to wit:

Undertaking on Appeal.

(Title of Cause.)

Whereas the defendant above named is about to take an appeal to the supreme court of the Territory of Montana from a judgment made and entered against him in the said district court in favor of the plaintiff in the said action on the 2d day of April, 1880, for the possession of certain land and tenements therein described and one hundred and twenty-eight $\frac{75}{100}$ dollars, costs of suit.

Now, therefore, in consideration of the premises we, the undersigned, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will prosecute his
appeal with effect, and will pay all costs and damages which
175 may be awarded against him on the appeal or on a dismissal
thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. And whereas the appellant is desirous of staying the execution of the judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, in the further sum of $257.50 dollars, being double the amount named in the said judgment, that if the judgment appealed from or any part thereof be affirmed or the appeal be dismissed the appellant will pay the amount directed to be paid by the judgment or order on the part thereof as to which the *the* same shall be affirmed if affirmed only in part. And whereas the defendant is desirous of staying the execution of the said judgment so appealed from, in so far as relates to the delivery of possession of the said land & prem-
ises, we do further, in consideration thereof and of the prem-
176 ises, jointly and severally undertake and promise and ac-
knowledge ourselves further bound in the further sum of one thousand dollars, being the amount for that purpose fixed by the judge of this court, that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon, and if the judgment be affirmed or the appeal dismissed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment, not exceeding the sum of one thousand dollars.

Dated this 13th day of June, A. D. 1881.

ROMAN T. KUHN.
JOHN R. WATSON.

TERRITORY OF MONTANA,
Lewis & Clarke County, } *ss:*

Roman T. Kuhn and John R. Watson, being duly sworn each for himself, says: That he is worth the amounts specified in the foregoing undertaking over and above all of his just debts and 177 liabilities, exclusive of property exempt by law from execution.

ROMAN T. KUHN.
JOHN R. WATSON.

Subscribed and sworn to before me, this 13th day of June, A. D. 1881.

WM. CHUMASERO,
Notary Public.

178 In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

ELLEN SULLIVAN, Respondent, *vs.* ELIJAH M. DUNPHY, Appellant.

I, A. H. Beattie, clerk of said court, do hereby certify that the foregoing one hundred and seventy-seven pages, numbered from 1 to 177, inclusive, contain a full, true, & correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled action, as the same remain on file & of record in my office.

In witness whereof I have hereunto set my hand and affixed my official seal, this 22d day of June, 1881.

[SEAL.] ALEX. H. BEATTIE, *Clerk.*

179 In Supreme Court, Montana Territory. January Term, 1882.

ELLEN SULLIVAN, Respondent, *vs.* ELIJAH M. DUNPHY, Appellant.

Be it remembered that in the present term of January, A. D. 1882, the above-entitled cause was brought into this court by virtue of an appeal from the judgment of the court below entered therein on the 2nd day of April, 1880, and was argued by counsel. Thereupon the cause was taken under advisement by the court.

And afterwards, to wit, on the 16th day of August, A. D. 1882, that being one of the term days of the August term 1882 of said supreme court, said cause came on for decision and judgment on appeal. Whereupon the court rendered its decision herein in writing, of which decision in words and figures the following is a copy, to wit:

180 *Opinion of the Court.*

In the Supreme Court of Montana Territory. August Term, 1882.

ELLEN SULLIVAN, Respondent, *vs.* ELIJAH M. DUNPHY, Appellant.

By GALBRAITH, Justice:

This is an action of ejectment to recover the possession of a lot in the city of Helena. The trial was by a jury. Issue was joined upon

the question of title in the plaintiff from the United States, through
the probate judge as trustee, &c., and other intervening conveyances,
upon the question of title in the defendant from the same sources,
also through intermediate conveyances, upon the question of quiet,
lawful, and exclusive possession by the plaintiff and her predecessors
in interest for a period longer than that prescribed by the
statute of limitations there is force, although the statute itself
181 is not mentioned in the allegations, and upon the question
of adverse possession by the defendant under a claim of right
or title for a period of more than five years, being the period prescribed
by the statute of limitations now existing. In our view of
the case questions relating to all the issues, except that of the possession
by the plaintiff, as above stated, may be dismissed from our
consideration and our inquiry confined to that alone. The jury in
their special findings say that on the 2nd day of August, A. D. 1870,
one Patrick McCann conveyed the premises in controversy by deed
to the plaintiff; that on that day the plaintiff entered into the actual
occupation thereof under the deed, and that she continued in the
actual occupany of the premises from that date until October the
4th, 1877.

Also in relation to the special issue presented: "Who was in the
possession of the said lot from March, 1874, to March, 1879?" The
jury found that the plaintiff was in possession from March,
182 1874, till October 4, 1877, and the defendant from October 4,
1877, till March, 1879. The jury also found that none of the
predecessors in interest of the defendant entered into the actual,
open, notorious, and exclusive possession of the premises, adversely
to the plaintiff prior to the month of October, 1877. The deed
from P. McCann to Ellen Sullivan, dated 2d August, 1870, was
offered without objection, and the testimony in relation to actual
occupation and possession by the plaintiff was sufficient to support
the above findings. There was a general verdict for the plaintiff.
The appellant aver-ed and offered in evidence upon the trial as the
inception of his title, a deed from the probate judge to one Henry
A. L. Tanner, to the premises in controversy, made the 22d day of
February, 1873. The jury were fully instructed as to what constituted
adverse possession under the statute of limitations, and the
appellant does not complain of any error or indicate any objection
to such instructions. According to the above findings and
183 general verdict under the instructions of the court, the jury
will be presumed to have found that the plaintiff took possession
of the premises in controversy under a claim of right or
title and was in possession of the same under such claim of right
or title when the deed from the probate judge to Tanner, under
which appellant claims, was made. The jury found expressly that
the defendant Tanner was not in possession of the premises until
the 4th of October, 1877. The plaintiff, therefore, had the adverse
possession of the property from the 22d day of February, 1873, until
the 4th day of October, 1877, being a period of more than three years.
Prior to the 22d day of February, 1873, and up till the 1st of August,
1877, title by means of adverse possession under the statute of limi-

tations was acquired in three years. We are warranted, therefore, in concluding from the special findings, general verdict and instructions of the court in relation to the acquirement of title by adverse possession to which no specific objection is made by the
184 defendant; that the jury did in fact find that the plaintiff
had established title to the property by reason of adverse possession under the then existing statute of limitations. It is claimed, however, by the appellant "that no right to the possession of said lot is claimed in the complaint or replication by virtue of adverse possession or statute of limitations; therefore such right, even if proved and found by a jury, could not have availed her anything." The complaint alleges "that this plaintiff and her grantors and predecessors in interest have been in the quiet, lawful, and exclusive possession of said premises since August, 1866, continuously up to and until the 4th day of October, 1877, and that this plaintiff was in the lawful, continuous, and exclusive possession of said premises from the second day of August, 1870, up to and until the 4th day of October, 1877." This allegation is denied by the answer, and the sole, exclusive, and peaceable possession of the premises alleged to be in the defendant since the 22d day of February, 1873. The
185 replication denies possession of any portion of the premises
by the defendant or his predecessors in interest prior to 4th October, 1877. As before observed, evidence was introduced upon the issue thus joined—special findings made thereon and a general verdict.

The Code of Civil Proc. provides that the allegations of pleading shall be construed with a view to substantial justice between the parties.

In Gillespie *vs.* Goner, 47 Cal., p. 257, which was an action in ejectment, Miles, justice, uses the following language: "The plaintiff's ownership in fee and right to the possession of the land at the commencement of the suit is averred, and under this he might prove any facts which would entitle him to possession at that time. The averment that the plaintiff's grantor had been in possession for more than five years was superfluous."

The issue joined upon the above allegations and denials necessarily involved the question of adverse possession under the statute of limitations, and the averment that plaintiff had been in
186 possession for more than three years prior to the 4th of Oc-
tober, 1877, would be merely surplusage. The case was evidently tried upon this theory. In this view of the case the general verdict is sustained by the pleadings, evidence, and the law in relation thereto.

The judgment is affirmed with costs.

D. S. WADE,
Chief Justice.
WM. J. GALBRAITH,
Asso. Justice.
E. J. CONGER,
Asso. Justice.

Thereupon judgment on appeal was entered in said cause as follows, viz:

187 In the Supreme Court, Montana Territory: August Term, 1882.

ELLEN SULLIVAN, Respondent, *vs.* ELIJAH M. DUNPHY, Appellant.

Whereas in the present term of August, A. D. 1882, of said supreme court the above-entitled cause came on for decision and judgment on appeal, whereupon it is now here ordered and adjudged by the court that the judgment of the court below entered in said cause on the 2nd day of April, A. D. 1880, be, and the same is hereby, affirmed with costs.

And it is hereby further ordered that the said respondent, Ellen Sullivan, recover against said appellant, Elijah M. Dunphy, —— dollars for the costs herein expended and have execution therefor.

16 August, 1882.

And on the 17th day of September, A. D. 1882, said appellant filed herein his writ of error, in words & figures following, viz:

188 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said supreme court before you in suit between Ellen Sullivan, plaintiff, and Elijah M. Dunphy, defendant, a manifest error hath happened, to the great damage of the said Elijah M. *M.* Dunphy, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record
189 and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable M. R. Waite, Chief Justice of the said Supreme Court, the 17 day of September, in the year of our Lord one thousand eight hundred and eighty-two.

ISAAC R. ALDEN,
Clerk Supreme Court of Montana Territory.

Allowed by Hon. Decius S. Wade, chief justice of the Territory of Montana.

DECIUS S. WADE,
Chief Justice.

And on the same day the said appellant filed herein his undertaking, to accompany said writ of error, in words and figures following, to wit:

190 Know all men by these presents, that we, Geo. H. Piatt and John R. Watson, of the county of Lewis & Clarke, in the Territory of Montana, are held and firmly bound unto Ellen Sullivan in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Ellen Sullivan, her executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 17th day of September, one thousand eight hundred and eighty-two.

Whereas lately, at a supreme court in and for the Territory of Montana, in a suit depending in said court between Ellen Sullivan, plaintiff, and Elijah M. Dunphy, defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and 191 a citation directed to the said Ellen Sullivan, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Elijah M. Dunphy, above named, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

GEO. H. PIATT. [SEAL.]
JOHN R. WATSON. [SEAL.]

Signed, sealed, & delivered in the presence of—
W. F. CHADWICK.

Amount of bond fixed, and the same approved this 17 day of Sept., 1882.

DECIUS S. WADE,
Chief Justice of the Supreme Court of Montana Territory.

TERRITORY OF MONTANA, *County of Lewis & Clarke:*

192 The obligors within named, being severally and duly sworn, each for himself, says: That he is a resident of the Territory of Montana, and that he is worth the sum named in the within bond, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

GEO. H. PIATT.
JOHN R. WATSON.

Subscribed and sworn to before me, this 17th day of September, A. D. 1882.

W. F. CHADWICK,
Notary Public.

And on the 23rd day of September, 1882, said appellant, Elijah M. Dunphy, filed herein his citation directed to said plaintiff, Ellen Sullivan, of which citation the following is a copy, to wit:

193 United States of America. In Supreme Court.

ELIJAH M. DUNPHY, Plaintiff in Error,
vs.
ELLEN SULLIVAN, Defendant in Error.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Elijah M. Dunphy is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Decius S. Wade, chief justice of the supreme court of the Territory of Montana, this 17th day of Sept., A. D. 1882.

DECIUS S. WADE,
Chief Justice.

194 Service of the above citation is hereby admitted, and copy waived, this 23d day of Sept., 1882.

SHOBER & LOWRY,
E. W. & J. K. TOOLE,
Att'ys for Def't in Error.

195 In the Supreme Court, Montana Territory.

ELIJAH M. DUNPHY, Plaintiff in Error,
vs.
ELLEN SULLIVAN, Defendant in Error.

I, J. R. Alden, clerk of the said supreme court, do hereby certify that the foregoing one hundred and ninety-four pages, numbered from 1 to 194, inclusive, contain a full, true, & correct transcript of certain pleadings, records, and proceedings filed, made, and had in said court in the above-entitled action as the same appear on file and of record in my office.

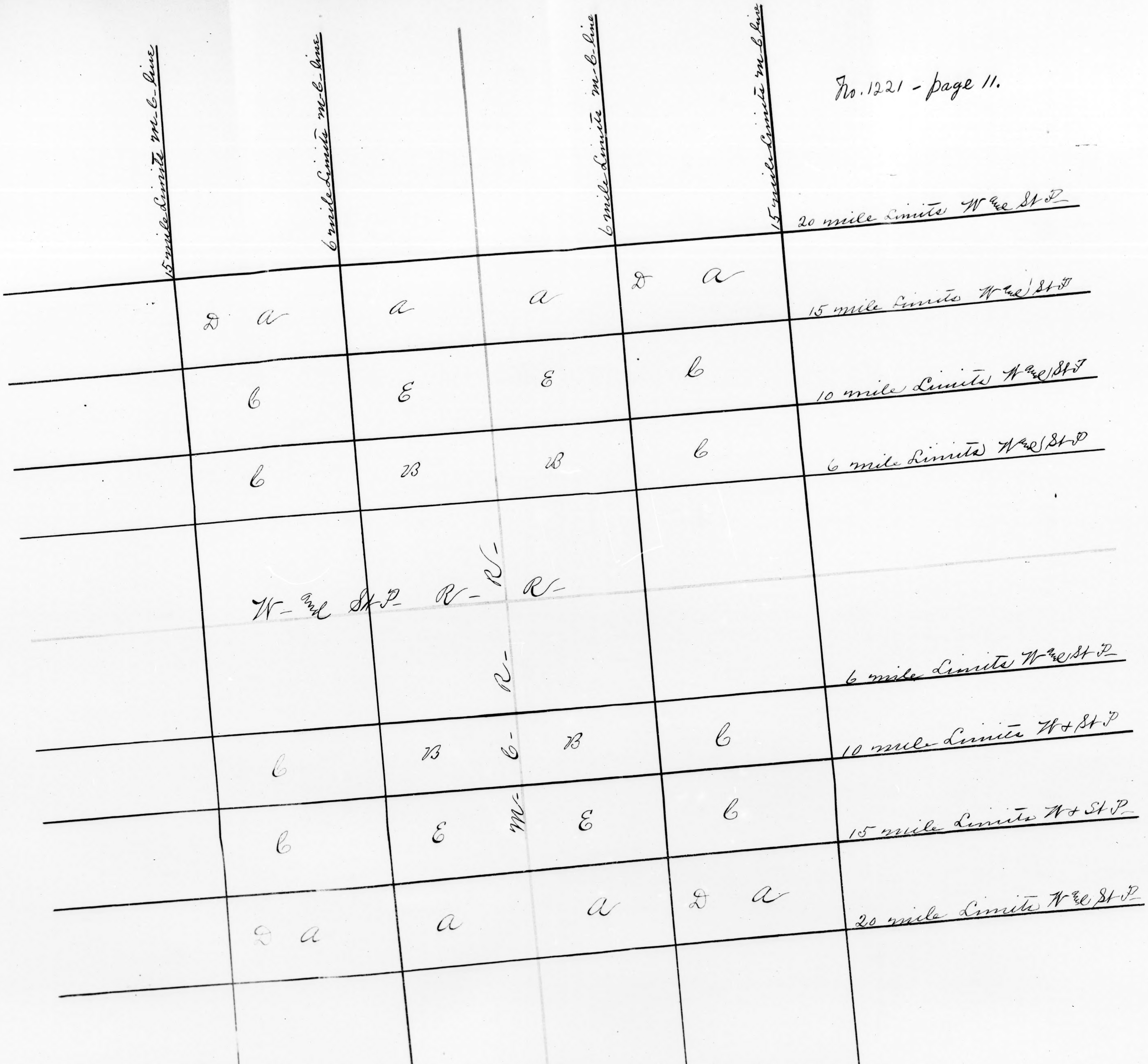
In witness whereof I have hereunto set my hand and affixed my official seal, this 26 day of October, A. D. 1882.

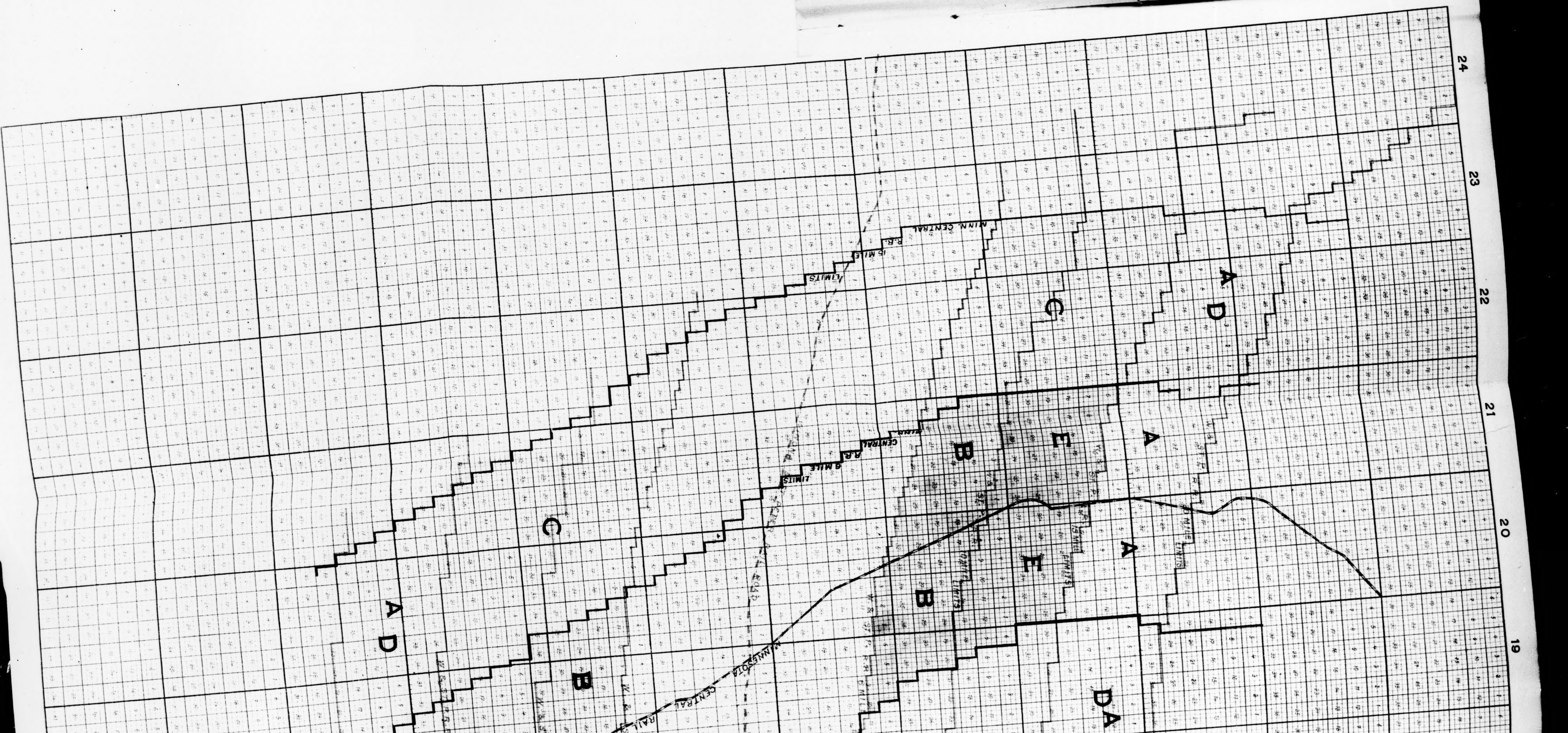
[Seal Supreme Court, Montana Territory.]

J. R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory, supreme court. No. 168. Elijah M. Dunphy, plaintiff in error, *vs.* Ellen Sullivan. Filed 10th November, 1882.

No. 1221 - page 11.

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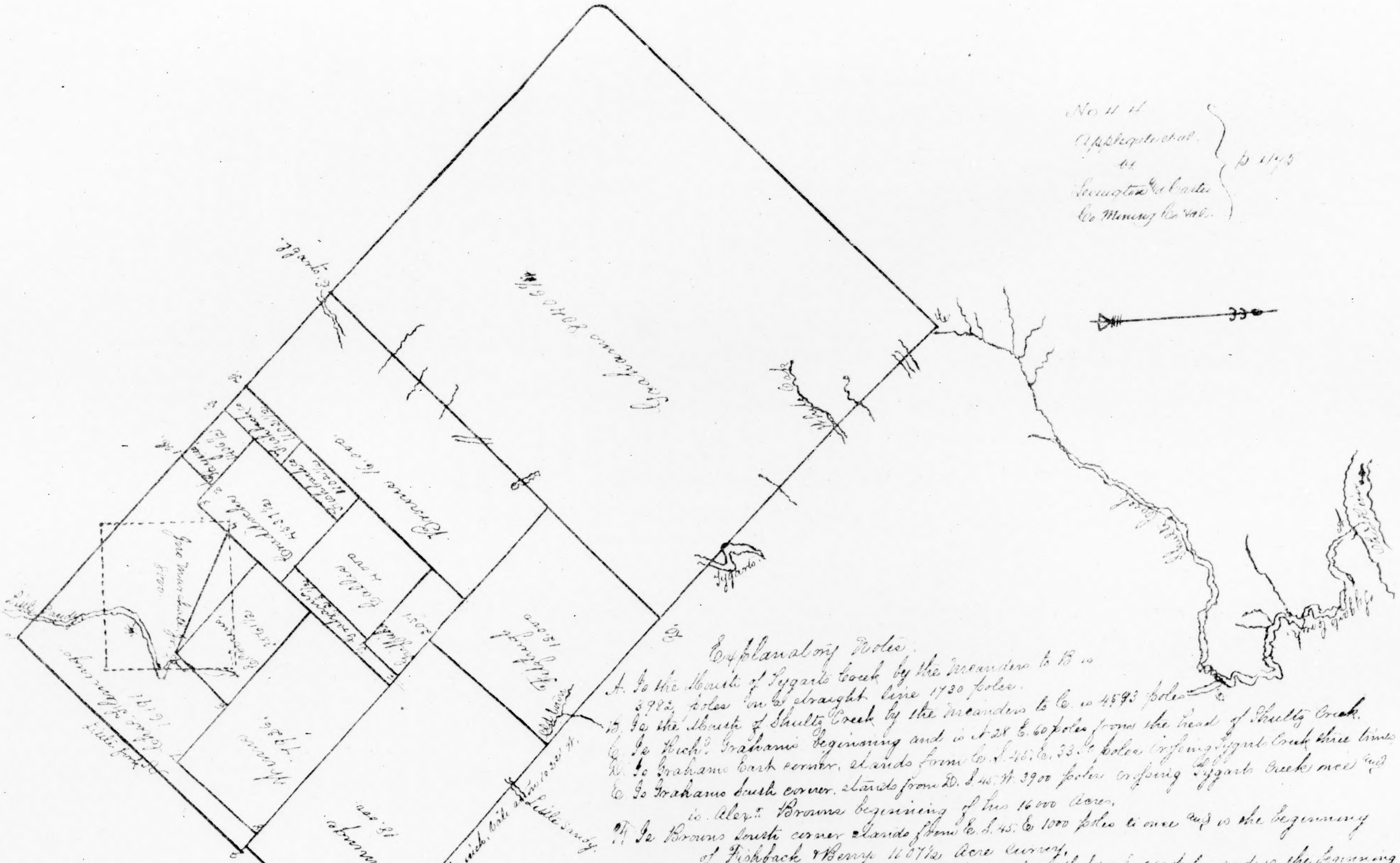
Applegate et al.
vs
Lexington & Carter
Co Mining Co et al. } p 1173



Explanatory Notes.

A. Is the Mouth of Tyggarts Creek by the meanders to B is 3982 poles on a straight line 1730 poles.
B. Is the Mouth of Shultz Creek by the meanders to C. is 4593 poles
C. Is Richd. Grahams beginning and is N 28 E. 60 poles from the head of Shultz Creek.
D. Is Grahams East corner. stands from C. S. 45. E. 3350 poles crossing Tyggarts Creek three times
E. Is Grahams South corner. stands from D. S. 45. W. 3900 poles crossing Tyggarts Creek once and is Alexr. Browns beginning of his 16000 Acres.
F. Is Browns South corner stands from E. S. 45. E 1000 poles to once and is the beginning of Fishback & Berrys 1107½ Acre survey.
G. Is Fishback & Berry's South corner. stands from F S. 45. E 260 poles and is the beginning of William Paynes 1406½ Acre Survey.
H. Is William Paynes South corner. stands from G. S. 45. E. 562½ poles and is the beginning corner of Charles Flemings 16191 Acre Survey.
1.2.3.4.5.6.7.8.9.0. Is Charles Flemings Corner of his 16191 Acre survey. all the lines of which are complete measure.
11 Is Montgomery's Salt works above the old lick.
The survey laid down with dotted lines. Is Marshall. Shore & McConnico 8000 Acres.